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IN THE

Supreme Court of the United States

October Term, 1964.

No. 391

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA, on Behalf of MICHAEL A. MUSMANNO,
Petitioner,

v.

COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

ABRAHAM E. FREEDMAN,
1415 Walnut Street,
Philadelphia, Pennsylvania 19102,
Attorney for Petitioner.

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COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

Petitioner, Democratic County Committee of Philadelphia, on behalf of Michael A. Musmanno, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, the highest court of the Commonwealth of Pennsylvania, entered in the above-entitled case on July 27, 1964, disfranchising 5,624 voters in the City of Philadelphia, the order dated August 6, 1964, subsequently changed to read August 7, 1964, and the order dated August 11, 1964, denying the Amended Petition for Reconsideration and/or Reargument, filed on August 6, 1964.

OPINIONS BELOW.

The opinion of the Court of Common Pleas is unreported and is printed in the Appendix hereto (*infra*, p. 2a). The majority opinion, on behalf of three of the five Justices of the Supreme Court of Pennsylvania, was filed on August 5, 1964, and is unreported. It is printed in the Appendix hereto (*infra*, p. 11a). One of the three Justices constituting the majority concurred in the result and the other filed a concurring opinion, which is unreported and which is printed in the Appendix hereto (*infra*, p. 23a). A dissenting opinion was filed on behalf of two of the five Justices on August 5, 1964 and is unreported. It is printed in the Appendix hereto (*infra*, p. 30a).

JURISDICTION.

A final order without opinion was entered on July 27, 1964, invalidating 5,624 votes in connection with the primary election on April 28, 1964, for the office of United States Senator in the Commonwealth of Pennsylvania (*infra*, p. 10a). Petitioner filed a Petiton for Reconsideration and/or Reargument on July 28, 1964. On August 5, 1964 the majority filed its opinion in support of its original order of July 27, 1964, in which it affirmed the order of the Court of Common Pleas (*infra*, p. 1a), upon the ground, inter alia, that petitioner "has not been deprived of any right ordained or guaranteed by the Constitution of the United States". The dissenting opinion, filed the same day, August 5, 1964, declares that the majority, in disfranchising the 5,624 voters, violated the Constitutionally protected rights of these voters, particularly Article I, Sections 2, 3, and 4, and the Seventeenth Amendment of the Constitution of the United States.

A Petition for Reconsideration and/or Reargument was filed on July 28, 1964, and an Amended Petition was filed on August 6, 1964, the day following the filing of the

Court's opinion. Said Petition was denied the following morning, August 7, 1964, by an order dated August 6, 1964, and filed August 7, 1964 (*infra*, p. 52a). Said Petition was not circulated among, nor read by, any of the members of the Court. The entry of the order of August 7, 1964, denying the Petition for Reconsideration was in violation of Constitutional due process under the Fourteenth Amendment of the Constitution of the United States. On August 11, 1964, the Court below entered an order (*infra*, p. 54a), holding that the Court, "although divided upon the merits of the appeal is unanimous in its opinion that no useful purpose can be served by either reconsideration of our order of July 27, 1964 or a reargument of the merits of this appeal", and, accordingly, denied said Petition for Reconsideration and/or Reargument.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Involved in this case are Article I, Sections 2, 3, and 4 of the Constitution of the United States and the Seventeenth Amendment to that Constitution, and the Fourteenth Amendment to the Constitution of the United States. Also involved are the following Pennsylvania statutes: Act of June 10, 1893, P. L. 425 and 430, which was superseded by the Election Code of Pennsylvania, Act of June 3, 1937, as amended by the Act of June 8, 1960, 25 Pa. Stat. Ann. §§ 3055 and 3056; Article IX, Section 1111, 25 Pa. Stat. Ann. § 3011(c) which strictly requires the election officials to properly prepare the machines for use, after notice to the political parties; Section 1107, 25 Pa. Stat. Ann. § 3007, which provides that the county board must so prepare the voting machines as to insure the electors' voting in a proper manner; Section 1216(d), 25 Pa. Stat. Ann. § 3056, which provides that the elector shall register his vote by depressing the lever "upon or adjacent to" the name of the candidate.

QUESTION PRESENTED.

Where, in an election for the office of United States Senator, the state statute permitted voting by the levers above or below the names of the candidates, and the Election Board set up the machines to have the vote recorded by the levers above the candidates' names, but left open and failed to block out the levers below the names, over the protest of one of the political parties, with full knowledge that such failure would cause many voters to use the levers below the names rather than those above, and, where, in fact, 5,624 voters actually used the lower levers, and where the intention of these voters was unmistakably clear to vote for the candidates immediately above the levers, since there were no other candidates below or in any other area to which these levers could have been related, does the decision of the Court below, in disfranchising the 5,624 voters, conflict with the requirements of Article I, Sections 2, 3, and 4 and the Seventeenth Amendment of the Constitution of the United States, requiring that every vote which is cast be counted where the intention of the voter can be ascertained?

STATEMENT OF THE CASE.

The primary election for the office of United States Senator in the Commonwealth of Pennsylvania was conducted on April 28, 1964. At the same time, in thirteen wards involved in this controversy in the City of Philadelphia, a special general election was held to fill a vacancy in the Congress. In preparation for the election in the thirteen wards, the County Board of Elections of Philadelphia County prepared the voting machines, and, in accordance with statute requirement in Pennsylvania,[1] communicated with the political party committees and made the machines available for inspection. Immediately

1. 25 Pa. Stat. Ann. § 3011(c).

upon an examination of the machines, the Democratic party committee of Philadelphia entered a vigorous protest against the manner in which the machines were set up. A picture of the voting machine showing the primary and general election candidates is attached to the opinion of the majority below (*infra*, p. 22a).

The Republican primary candidates were set forth in the top row, above which was a channel of levers marked "A". Immediately beneath the Republican row was another channel of levers marked "B", below which was set forth the row of Democratic candidates. Immediately beneath that row was a channel of levers marked "C". Below that channel was a blank row, beneath which was another channel marked "D", below which was another blank row.

The two candidates in the general Congressional election were set under an arrow in a vertical column outside of and to the right of the area reserved for all the candidates in the primary election.

The Election Code in Pennsylvania in prescribing the manner in which voting may be done upon machines provides that the levers which register the vote may be "upon or adjacent to" the candidates' names (25 Pa. Stat. Ann. § 3056). In practice, this has been construed to mean above or below the candidates' names. In Pittsburgh, Pennsylvania, the knobs are placed below the candidates' names. In Philadelphia, the levers are placed above the candidates' names. Thus, a vote may be cast from levers above or below the names in full compliance with the statute.

In this case, in Philadelphia, there being only two rows of candidates for the primary election with the Republican row being on top, when a Republican entered the booth to vote, the channel of levers marked "B" which was below the Republican row but above the Democratic row was locked, leaving only the channel of levers marked "A" above the Republican row open. When a Democrat entered the booth, channel "A" above the Republican row

was locked, leaving channel "B", above the Democratic row, and channel "C" which was beneath it, open. Under the statute therefore, a Democratic voter could register his vote by pulling the lever above or below the Democratic candidates since there were no other candidates to which these levers could apply.

The Democratic City Committee protested because it was obvious that many Democratic voters would use Row "C" unless it was blocked off and locked. There was no statutory prohibition against use of the lower levers. This was dependent upon the set up of the machines by the Election Board. The Election Board, however, failed to issue any instructions to the voters not to use Row "C", and, arbitrarily refused to block off that row because of the cost of $3,000.00. Nor did it affix any instructions on the voting machine itself. The Election Board was thus put on notice, and recognized the probability of Democratic voters voting in Row "C". Its failure to take action under these circumstances was, as all the Courts below found, inexcusable and indefensible! The Election Board by its action had thus set up a trap for the unsuspecting Democratic voters.[2]

The result which the Democratic City Committee warned against became a reality when the voters went to the polls. Five thousand, six hundred twenty-four voters, representing approximately ten per cent of the votes cast in the thirteen wards, pulled the levers in channel "C" below the Democratic candidates' names.[3] The Election

2. It is most significant that in the course of the argument in the common pleas court the judge requested the Solicitor for the Election Board to point to the levers in Row "C", whereupon, this experienced counsel pointed to the levers in Row "D", clearly indicating that he considered the levers in Row "C" as the appropriate ones for the Democratic voters, precisely the same thing which was done by the 5,624 voters (Test. 52-53).

3. The tabulation of the votes cast in Row "C" demonstrates a pattern of voting throughout all of the thirteen wards, giving Blatt a total of 2,094, Roberts 181, and Musmanno 3,349, giving Musmanno a plurality of 1,255 votes. The ratio of this vote, representing ten per

Board thereupon threw out and nullified every one of those votes. Thus, in one fell swoop, the Election Board disfranchised 5,624 voters, notwithstanding the fact that the intention of those voters to vote for the Democratic candidates was clear, and that sole responsibility for the votes in Row "C" rested upon the Election Board.

The Majority Opinion of the Court Below.

The majority of the Court below refused to consider the intention of the voters and nullified all 5,624 votes, castigating the electors for having voted "stupidly", "carelessly", "hurriedly", "absent-mindedly" and "illegally" (*infra*, p. 15a). The majority holds, contrary to the undisputed evidence, that the voting machines were clearly marked and free from error. Having thus found the machines to be free from error the majority thereupon makes the following remarkable finding which is squarely opposed to and inconsistent with the foregoing finding: "If the Election Board had had locked (or blocked off) at a cost of $3,000.00 the blank spaces on Row "C", it would have prevented those controversial votes" (*infra*, p. 14a, fn.).

The majority attempts to minimize the seriousness and magnitude of the vote in Row "C", by saying "Appellant contends that there were nearly 6,000 votes for the Democratic nominee for the United States Senate in 13 wards. Even if this be accurate, when broken down it amounts to less than 12 to a division and less than 7 to each voting machine used in the 13 wards." This attempt to lessen the importance of the grave nature of the matters here involved by reducing the voting figures to voting machine level only emphasizes the superficial attention given by the majority to the momentousness of the startling fact that 5,624 voters have been disfranchised.

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cent of the total vote in the thirteen wards is the same as the ratio of the remaining ninety per cent. The tabulation submitted by the Election Board is attached hereto and marked "Exhibit A".

In refusing to consider the voter's intention, the majority below relied upon an early Pennsylvania state case decided in 1897, *Contested Election of Flynn,* 181 Pa. 457. In adopting the rationale of that decision, the Court below necessarily repudiated and departed from a long line of decisions of its own court, holding to the contrary.

Apart from the fact that the *Flynn* case is distinguishable on its facts, its decision, particularly as construed by the majority below, is in direct conflict with the Constitution of the United States and with the decisions of this Court. Since this petition involves an election for United States Senator, the *Flynn* doctrine must yield to the federal law. The *Flynn* case was decided on the basis of an early Pennsylvania statute, Act of June 10, 1893, P. L. 419, which prescribed the method and manner of voting. That statute has long since been expressly repealed and superseded by the existing Election Code, Act of June 3, 1937, P. L. 1333, art. XII, § 1215, as amended by the Act of January 8, 1960, P. L. (1959), 2143, § 3, 25 P. S. § 3055. The decisions construing the Election Code give the intention of the voter paramount consideration in determining the validity of the vote. In adopting the rule of the *Flynn* case, the majority came into conflict with the federal decisions, as well as with the Pennsylvania state decisions.

In nullifying the 5,624 votes cast in Row "C", the majority disclaimed responsibility for this disfranchisement, stating that the electors disfranchised themselves by voting stupidly, absent-mindedly, etc. Neither these derogatory remarks, nor the conclusion of the court, is justified. The fact is that the Court did disfranchise these voters without legal or moral reason.

Concerned about the impact of its decision on the federal law since the election involved a United States Senator, the majority below nakedly declared, without discussion, that the disfranchisement of the 5,624 voters "did not deprive these voters of any right ordained or guaranteed by the Constitution of the United States." This

conclusion is likewise insupportable in law. Indeed, the decisions of this Court are directly to the contrary, as will hereinafter appear.

The Dissenting Opinion of the Court Below.

The dissenting opinion of Mr. Justice Jones, joined in by Mr. Justice O'Brien, notes first of all that in discussing the facts the majority deals in "sheer speculation"; that the majority committed basic error in failing to consider the intention of the voters; that the majority violated the principle that the courts cannot act on conjecture in nullifying the right of suffrage; that the majority erred in failing to resolve all doubts in favor of the validity of the vote.

The dissenting opinion fully recognizes the importance and significance of the voters' intention in determining the validity of the ballot, and states as follows:

> "The fallacy of the majority's position in this respect is self-evident: its complete rejection of the factual data on this record. What is even more astounding is the clear implication in the majority opinion that, even if the voters' *intent* were ascertained, such intent would not be recognized because voters, in the manner of their voting, failed to comply with the letter of the election statute!!" (Emphasis supplied.)

In condemning the Elections Board for its carelessness and irresponsible conduct, the dissenting opinion, in quoting from a landmark Pennsylvania decision, declared:

> " 'If we, by our decision, should permit the carelessness . . . of [election] officers . . . to defeat the election . . . , we would thus make the people suffer for an act in which they did not participate, and which they did not sanction.' "

Since the majority relied principally on the *Flynn* case,[5] decided in 1897, Mr. Justice Jones traces the development of the election laws, showing that the facts in the *Flynn* case are entirely different from those at bar but in any event that decision could have no application under the present law, since it was decided under a statute and principles of law which have long since been superseded. The opinion notes that until the passage of the voting machine law (Act of April 18, 1929, P. L. 549), all voting was by paper ballot and the pre 1929 statutory law referred only to voting by such method, and designated the precise manner and place where voting was required to be done. The pertinent sections of the Act of 1893 were repealed by the Election Code[6] (completely overlooked by the majority opinion). Section 1215(b) of that Act changes the manner of voting on paper ballots and relaxes the rigidity previously exacted. More importantly, the Legislature made different provision for voting on machines than is applicable to paper ballots, giving more liberality to ascertaining the voters' intent, where votes are cast on machines.

The dissenting opinion also gives specific consideration to that part of the Election Code, 25 Pa. Stat. Ann. 3056(d) which provides that the elector may vote by operating the lever "upon or adjacent to" which the name of the candidate is placed, *thereby demonstrating that the voters in this case were in full conformity with the requirements of the statute by operating the lever beneath the name rather than the one above the name.*

In dealing with the effect of the voters' intent, the dissenting opinion notes that until the passage of the 1919 statute in Pennsylvania, the courts leaned toward a rigid rule which rendered invalid any vote not cast in a strict and literal compliance with the statute and regardless of

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5. *Contested Election of Flynn,* 181 Pa. 457 (1897).

6. The Act of June 3, 1937, P. L. 1333, art. xii, § 1215, as amended by the Act of January 8, 1960, P. L. (1959), 2143, § 3, 25 Pa. Stat. Ann. § 3055.

whether the intent of the voter could be ascertained; that since the passage of the 1919 statute, the Pennsylvania Supreme Court followed the rule, consistent with the federal policy, giving liberal recognition and weight to the intent of the voter once ascertained, citing *Knight v. Coudersport Borough,* 246 Pa. 284; and that since that time, the dissent points out, the voters' intent has become the paramount consideration in determining the validity of the vote, even though there may be technical non-compliance with the statute.

In concluding, Mr. Justice Jones notes the conflict of the majority decision with the provision of the federal Constitution (p. 25):

> "The right to vote for United States Senator is protected and guaranteed by the Constitution of the United States (Art. I, Sec. 2 and 3; 17th Amendment). The right to vote obviously carries with it the right to have one's vote counted. In *U. S. v. Classic,* 313 U. S. 299, 314-16, 61 S. Ct. 1031, 85 L. Ed. 1368, the U. S. Supreme Court has recognized as a right 'secured by the Constitution' the right of voters *'to cast their ballots and have them counted'*. As a result of the majority view thousands of voters have been denied this constitutional right. The Supreme Court of the United States in *Gray v. Sanders,* 372 U. S. 368, 380, — L. Ed. —, declared: 'The right to have one's vote counted has the same dignity as the right to put a ballot in a box.' See also *Wesberry v. Sanders,* 376 U. S. 1, 11 L. Ed. 2d 481, 486. A study of the majority opinion does not reveal any sound, let alone *compelling,* reason for the denial of this right."

Petitioner herein seeks review and reversal because of the conflict between the decision of the majority below and the Constitution of the United States, and the decisions of this Court.

REASONS FOR GRANTING THE WRIT.

I. In Disfranchising 5,624 Voters in a Primary Election for Allegedly Voting in the Wrong Place, the Court Below Refused to Consider the Clear Intention of the Voters, Contrary to the Requirements of the Constitution of the United States, to the Many Decisions of This Court, Including *Wesberry v. Sanders*, 376 U. S. 1, 11 L. Ed. 2d 481; *United States v. Classic*, 313 U. S. 299; *Gray v. Sanders*, 372 U. S. 368, 9 L. Ed. 821; *Ex parte Siebold*, 100 U. S. 371; and *Ex parte Yarbrough*, 110 U. S. 651, and Contrary to the Decision of the Court of Appeals for the First Circuit in *National Labor Relations Board v. Whitinsville Spinning Ring Co.*, 199 F. 2d 585.

In affirming the action of the County Board of Elections in this case, the decision of the Court below collided head on with the United States Constitution and with decisions of the federal courts setting the standards in these cases. It deprived 5,624 United States citizens of their constitutionally guaranteed right to participate in a federal election.

At the very outset it may be noted that while elections for Congressional offices are regulated and conducted by the various states, the right to vote in these elections stems not from the state law, but originates in the Constitution of the United States and is judicially protected by the provisions of that instrument. *Ex parte Yarbrough*, 110 U. S. 651; *Wiley v. Sinkler*, 179 U. S. 58; *Ex parte Siebold*, 100 U. S. 371; *Smith v. Allwright*, 321 U. S. 649; *United States v. Classic*, 313 U. S. 299; *Swafford v. Templeton*, 185 U. S. 487. In *Wiley v. Sinkler, supra*, Mr. Justice Gray stated the origin of the right as follows:

> "The right to vote for members of the Congress of the United States is not derived merely from the

Constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States." (179 U. S. at 62)

Nor may any distinction be made on the ground that a primary election is here involved rather than a general election. *United States v. Classic*, 313 U. S. 299.

The right of suffrage is without doubt one of the most precious possessions of every American citizen. It stands as the foundation stone of democracy and it is protected against all forms of invasion which might impair or destroy the right by the Constitution of the United States. The Supreme Court of the United States has, by a series of decisions, insured against any interference with the right and has guaranteed its preservation against all forms of encroachments—to the end that the *will* or *intention* of the majority be given full expression. Anything less would destroy the democracy.

Basic and implicit to the right to vote is that the will or intention of the voter be given full effect so that the will or intent of the majority may govern the whole. This can only be ascertained by the cumulation of the intents of the individual voters. Pursuant to that objective, the Supreme Court has barred conduct designed to "stuff" or "loot" the ballot boxes because this would dilute the vote and defeat the will or intent of the majority; the same is true with respect to altering the ballots and other means of ballot tampering. *Wesberry v. Sanders*, 376 U. S. 1, 11 L. Ed. 2d 481 (1964). This Court goes to the limit in insuring against diluting the vote on an individual basis or on a group basis. The objective is the same in all cases: protection of the will and intent of the individual voters who, collectively, determine the intent or will of the majority, which, in turn, governs the democracy.

The decisions of the Supreme Court of the United States, in the protection of the voters' rights to insure against encroachments on the voters' will and intent, have

enjoined not only the state governments, but also the individuals whose actions violate the federal standards in any Congressional election. In *United States v. Classic, supra,* the Court sustained an indictment against state employees for willfuly altering and falsely counting and certifying ballots cast in a primary Congressional election for Representative in Congress. In *Ex parte Yarbrough, supra,* an indictment was sustained against state officials who conspired to prevent citizens from voting in a Congressional election. It is no less an offense to set up voting machinery which leads to a disfranchisement of the vote than it is to engage in other forms of illicit activity to prevent the vote or otherwise negate it. In *United States v. Mosley,* 238 U. S. 383, the Supreme Court sustained an indictment against state officials who had conspired to alter the election returns and omit votes from the count. This is the same as dipping the hand into ballot boxes, and it differs in no material respect from disfranchising voters by the manner in which a voting machine is set. In *Gray v. Sanders,* 372 U. S. 368, the Supreme Court struck down the state's county unit system in a senatorial election as a basis for counting the votes on the ground that the Equal Protection Clause required every voter to be "equal to every other voter when he casts his ballot". The voters who cast their ballots in Row "C" in the instant case were equal to every other voter who cast their ballots in Row "B". In *Ex parte Siebold, supra,* state election officials were convicted of interfering with a Congressional election by preventing a supervisor of elections from performing his duties, by "stuffing the ballot box" and by perpetrating other illegal activities. In defense of the culprits, it was argued that the Federal Government had no power to enforce state laws to punish state officials. The Supreme Court of the United States, rejecting this contention, said the reach of the federal arm extends as far as is necessary to protect the voters and to restrain and punish those who would interfere with the right. Said the Court, at 723:

"It is the duty of the States to elect Representatives to Congress. The due and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the State Government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, state and national. A violation of duty is an offense against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a Representative owes no duty to the National Government which Congress can enforce; or that an officer who stuffs the ballot box cannot be made amenable to the United States."

It was no less an offense for the election officials in the case at bar to set up the voting machines either by design or neglect in a manner as to cause certain of the electors to vote on Row "C" and then forfeit those votes.

Emerging from the foregoing and many other related decisions, came the doctrine of "One person, one vote", in support of the principle that every elector's vote must be given the fullest effect and placed on an equal basis with every other vote. Mr. Justice Douglas said in *Gray v. Sanders, supra:*

"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nine-

teenth Amendments can mean only one thing—*one person, one vote.*" (372 U. S. at 830-31) (Emphasis supplied.)

Another principle invoked by the Supreme Court to strengthen and further protect and give full value to the electors' exercise of vote was expressed by Mr. Justice Holmes in *United States v. Mosley, supra,* where the election officials were charged with failing to count certain of the votes, in these terms:

> "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." (238 U. S. at 386)

This latter doctrine served to rebuff all those devious efforts directed to invalidating the votes once cast. This pronouncement of the court effectively strikes down all such activities. Mr. Justice Roberts, in *United States v. Saylor,* 322 U. S. 385, held that the refusal to count the vote differed in no respect from keeping the voter out of the polling place, stating:

> "The conclusion was that § 19 protected personal rights of a citizen including the right to cast his ballot, and held that to refuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from the polling place. The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted." (322 U. S. at 387-88)

To the same effect is *Gray v. Sanders, supra,* where the Supreme Court held:

> "The Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted at Con-

> gressional elections.' . . . Every voter's vote is entitled to be counted once. It must be correctly counted and reported. As stated in United States v. Mosley, 238 U. S. 383, 386, 59 L. ed. 1355, 1357, 35 S. Ct. 904, 'the right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' " (372 U. S. at 380). (Citations omitted.)

The depth, width and breadth of the protection of the doctrine giving the fullest value to the will and intent of the voter is no better illustrated than in the decision in *Wesberry v. Sanders,* 376 U. S. 1, 11 L. Ed. 2d 481 (1964), where the issue involved the apportionment of votes in Congressional districts. The decision embraces within it not only the right to vote, the right to have the vote counted and the right to have full effect given to the will and intent of the voter, but it extends even further, holding that such rights may not be impaired by reason of the disproportion of the voters in the districts. Mr. Justice Black, speaking for the Court, said:

> "We hold that, construed in its historical context, the command of Art. I, §2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (11 L. Ed. 2d at 486-87)

After a review of the history, Mr. Justice Black further observed, at 492:

> "It is in the light of such history that we must construe Art. I, § 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be chosen 'by the People of the several States' and shall be 'apportioned among the several States . . . according to their respective numbers.' It is not surprising that

> our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their votes counted."

The Court thereupon makes it crystal clear that the right to vote may not be impaired in any manner, stating, at 492:

> "Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, see United States v. Classic, 313 U. S. 299, 85 L. ed. 1368, 61 S. Ct. 1031, or diluted by stuffing of the ballot box, see United States v. Saylor, 322 U. S. 385, 88 L. ed. 1341, 64 S. Ct. 1101. No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

The action of the Board of Elections and the decision of the majority below in the instant case come into direct conflict with the foregoing most recent pronouncement of the Supreme Court. It would seem conclusively clear that under no circumstances could the 5,624 voters be disfranchised by the entrapment of the Election Board as was done in this case. At most, if, in another context, the voters' intention could not be ascertained, because of a faultily prepared voting machine, a new election would necessarily be in order, but not disfranchisement. In view, however, of the unmistakably clear intention of the voters, the mandate of the United States Supreme Court's decisions required the votes to be counted.

The majority below, in disfranchising the thousands of voters, derogatorily placed the reason for that action on alleged personal characteristics—with not a scintilla of evidence in support—declaring that they had voted "stupidly", "hurriedly", "absent-mindedly" and "protestingly". This finding, which is wholly foreign to the

enlightened principles long espoused by this Supreme Court. In the *Wesberry* case, Mr. Justice Black laid down the rule in sharp contrast to the harsh and foreign doctrine of the Court below, in quoting from Madison, as follows:

> "'Who are to be the electors of the Foederal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. . . .'
>
> "Readers surely could have fairly taken this to mean, 'one person, one vote.' Cf. Gray v. Sanders, 372 U. S. 368, 381, 9 L. ed. 2d 821, 831, 83 S. Ct. 801." (11 L. Ed. 2d at 492)

It is thus clear that the Court below, in disfranchising the thousands of voters because of an alleged irregularity, committed the most basic and fundamental error, not only in refusing to give heed to the intention of the voters, but in testing the vote based on station in life and education. There has never been any place in American jurisprudence for such distinctions.

The doctrine of the Court below conflicts not only with the long-established and firm principles in the election laws, but it is likewise refuted by the same principles which have been consistently applied in all litigations involving public, and even private, operations. In *National Labor Relations Board v. Whitinsville Spinning Ring Co.*, 199 F. 2d 585, the labor board disfranchised a voter in a secret election because of an erasure on the ballot and refused, as the Court below did here, to give consideration to the intention of the voter. The Court of Appeals for the First Circuit reversed, holding that the board committed fatal error in failing to consider the intention of the voter. In declaring that the same rule which applied in political elections ap-

plied also in the labor board elections, the court of appeals stated:

> "The only purpose of any election, *be it a political election* or one conducted by the Board to determine a bargaining representative, *is to discover the intent* of the qualified electors *to the end that effect may be given to the will of the majority.*" (199 F. 2d ta 587) (Emphasis supplied.)

In analyzing the problem as it related to the intention of the voter, the Court said further.

> "'. . . the Board, instead of following its usual practice in this situation of looking for the voter's intent, did not reach the question of intent at all, because it accorded controlling and conclusive significance to the single fact that an attempted erasure appeared on the ballot. We must confess that we can find no logical reason why the Board should single out an erasure, or an attempt at erasure, on a ballot for special treatment by considering all such ballots necessarily mutilated and therefore void. Moreover, it seems to us only fair that a voter should be apprised of such an extraordinary rule. While the statement printed on the ballot directed the voter to obtain a new ballot if he 'spoiled' the original one, the word 'spoiled' was in no way defined, and it is difficult for us to say that the average voter would consider a ballot 'spoiled' merely because it contained a slight erasure. If departure from orthodoxy in marking ballots is to be countenanced by the Board at all, as it clearly is from the decisions cited above, then, in the absence of any question of voter identification, the problem is, as the Board has repeatedly held, to discover if possible the voter's intent. In view of this policy we feel forced to the conclusion that there is no logical reason for holding that an erasure, or an attempted one, on a ballot for that reason alone automatically mutilates a ballot and renders it void.

It therefore seems to us that the ballot here under consideration ought to be counted *if the intention of the voter can be determined therefrom with reasonable certainty.*" (199 F. 2d at 588) (Emphasis supplied.)

In reversing, the Court concluded:

> "Ordinarily this question of voter intention is for the Board, so in the present situation we would ordinarily remand to the Board for a determination of that question. But an inspection of photostatic reproductions of the disputed ballot and of the actual ballot itself leaves us with the firm conviction that the intention of the voter to vote 'No' is so abundantly clear that we may as well say so now in the interest of terminating this proceeding without further unnecessary delay." (199 F. 2d at 588-59)

The doctrine requiring effect to be given to the voters' intention has received the widest application in litigation of private, as well as public, matters. In *Pacific American Fisheries v. Gronn*, 103 F. Supp. 405 (1952), where in an election for the selection of directors certain of the votes were rejected because they were allegedly improperly cast and the officers refused to consider the voters' intention, the Court reversed, stating, "It is well settled that the intent of the voter when ascertainable must be given effect."

Other state jurisdictions consistently follow the same rule. In *Thompson v. Boling*, 240 Ky. 340, 42 S. W. 2d 321 (1931), in a situation far more difficult than the one at bar, where a paper ballot was involved and the voter marked his ballot below and to the side of the candidate's name, the court found that notwithstanding the irregularity in the voting, the voter's intention was clear and the vote was counted. Said the Court:

> "It is a general rule that when it is clear that the voter has made an honest effort to conform to the direc-

tions of the statute as to the manner of voting, although with imperfect results, the ballot should be counted if the intention of the voter can be effectuated.

* * *

"It is not enough that some possibility defeating the evident purpose of the voter can be conjectured. The rule requires only reasonable probability, and that which was probably intended cannot be said to be impossible of ascertainment. . . .

* * *

"It is reasonable to presume that the voter intended to vote for some one, and when he did not register his choice with precision it is a just inference, in the absence of anything further to show his intent, that he intended to vote for the name nearest his mark. . . ." (S. W. 2d at 322)

The late Judge Lehman, speaking for the New York Court of Appeals in *Matter of Creedon*, 264 N. Y. 40 (1934), said:

"*The statute gives the courts no power to disfranchise a single voter and certainly no power to disfranchise the voters of whole election districts.* They must determine from the evidence presented the number of votes cast for the candidates. *They cannot act on conjecture, but, as in all other matters presented to them, they may act on logical inferences based on human probabilities.*" (Emphasis supplied.)

The texts are to the same effect. Paine on Elections, § 595 states:

"An election will not be invalidated by mere neglect or irregularity, on the part of the officers, in making up the returns if the will of the voters, legally expressed, can be ascertained with certainty."

Nor, prior to the decision of the majority below in this case, was the rule any different in Pennsylvania. As the dissenting opinion in this case points out, since the passage of the 1919 Pennsylvania statute, the Pennsylvania courts have given recognition to the intent of the voter once ascertained. *Knight v. Coudersport Borough*, 246 Pa. 284; *Fish's Election*, 273 Pa. 410; *Gegg's Election*, 281 Pa. 155; *Norwood Election Contest Case*, 382 Pa. 547, where the Pennsylvania Supreme Court significantly stated, "Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." In *McCracken Appeal*, 370 Pa. 562, the court said, "In any disputed election nothing can be more vital towards the accomplishment of an honest and just election than the ascertainment of the intention of the voter." See also *James Appeal*, 377 Pa. 405, where the court said, "In the sphere of public elections which, after all, constitute the very warp and woof of democracy, nothing can be more vital in the accomplishment of an honest and just election than the ascertainment of the intention of the voter."; *Reading Election Recount Case*, 410 Pa. 62, where the court held if, from the ballot cast, the intent of the voter in his choice for a candidate for office can be ascertained, then such ascertained intent must be granted full recognition and the ballot counted, even though there be a technical non-compliance with the election statute.

The majority decision of the Court below reverses the long line of enlightened Pennsylvania decisions and turns the clock back to the previous century. Whatever might be the effect of that decision insofar as local election contests are concerned, it cannot possibly have any application in the instant case, being in direct conflict with the federal decisions.

The majority below speculated without any support in the record that it was possible for a Republican to vote on Row "C". First of all, this would have been impossible because as soon as the Republican pulled the lever of his

choice in the Republican row, he automatically thereby locked all the other levers for that office, including Rows "B" and "C". To impute an intention to a Republican to vote in a Democratic primary moreover is to impute an unlawful intention which is forbidden by strong presumption in the law, as the dissenting opinion so clearly points out. As the court said in *Simon Election Case,* 353 Pa. 514:

> "Where acts are of an official nature . . . a presumption arises in favor of their due execution. . . . It is a maxim of the law . . . to presume that what has been done was done of right, and not of wrong. The law will presume in favor of honesty and against fraud (citing cases) Broom's Legal Maxims' 10th edition, p. 640 et seq."

In *Winlack v. Geist,* 107 Pa. 297, 301, the Supreme Court of Pennsylvania said:

> "When a man does an act, the presumption in absence of evidence otherwise is that he acted rightfully and not wrongfully."

See also *Wilkes-Barre & E. R. R.,* 311 Pa. 510, 514; *Waters v. New Amsterdam Cas. Co.,* 393 Pa. 247, 254; *Horan v. Weiler & Ellis,* 41 Pa. 470. In *Silverman v. Rumbarger,* 4 Pa. Super. 439, 442, the Court stated:

> "It is a presumption of law that everyone has conformed to the law, and the burden is upon who alleges the contrary: (19 Am. & Eng. Ency. of Law, 42.)"

There is not a shred of evidence in this record to show that the Republican voters crossed over to vote in Row "C".

The statements of the majority that the word "Republican" in the special election was opposite the channel of levers marked "C" is incorrect. An examination of

the picture attached to the opinion below shows the word Republican well below the entire channel "C" levers. That channel was immediately below the names of the Democratic candidates, and no other candidates were below that channel.

Involved in this petition are three candidates for the office of United States Senator in the primary election of April 28, 1964, Blatt, Roberts and Musmanno. The record establishes that when the Democratic voters entered the booth, the channels of levers above and below these three names were all open. There were no instructions on the machines. The Election Board was fully aware of the probability that Democratic voters would vote the lower rather than the upper levers. The intention of the thousands of voters who used Row "C" was unmistakably clear to vote for Blatt, Roberts or Musmanno, depending upon which name was above the lever pulled. As the court said, in *Reading Election Recount Case,* 410 Pa. 62 (1963):

> "'*Marking a ballot in voting is a matter not of precision engineering but of an unmistakable registration of the voter's will* in substantial conformity to statutory requirements.'" (Emphasis supplied.)

The instant case satisfied all of these criteria. The statutory requirements permitted voting below the name, as is done in Pittsburgh, Pennsylvania, or adjacent to the name in the Philadelphia area.[7] Here, by leaving the levers open above and below the name, the Board of Elections, in effect, invited the voters to use either the upper or the lower levers. Of course, when one of the levers is depressed, it locks the entire area to preclude more than one vote by the same elector.

In setting up the machines without any instructions, the Election Board, by now invalidating the votes cast upon

7. The so-called Jamestown machines in this case placed the lever above the nominee's name, while the Shoup machines placed the lever to the side of the candidate's name.

the lower levers, effectively entrapped all those thousands of voters who pulled the lower levers.[8]

It is incredible that the Board of Elections, being solely responsible for the condition, should refuse to count the votes cast on Row "C", when the intention to vote for the candidates immediately above the levers was so unmistakably clear. An examination of the photograph attached to the opinion of the Court below quickly demonstrates the point. As will be observed, there are no other candidates below or in any other area to which the levers in Row "C" could be related other than the candidates immediately above each lever; namely, Blatt, Roberts and Musmanno.

The decision of the Court below conflicts with the established principles of this Court and other federal courts and, if permitted to stand, will result in countless abuses of the election machinery, not only in the forthcoming general election in November, but in all succeeding elections, unless this Court grants the Petition for Writ of Certiorari and reverses the decision of the majority below. The disfranchisement of the 5,624 voters cries out for immediate summary reversal, in accordance with the established principles of this Court.

The issue here involves the nomination of a United States Senator who must be placed on the ballot for the general elections scheduled to take place on November 3, 1964. Many and extensive preparations are required to be

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8. The majority opinion refers to a sample ballot which was, in itself, most confusing since it did not portray the channels of levers at all and showed individual levers inside the squares with each candidate's name, thus creating confusion in the mind of any voter who examined the sample ballot and entered the voting booth to find an entirely different set up. Nor were the small model voting machines of any assistance because they showed only Rows "A" and "B" and did not have Rows "C" and "D", as did the actual voting machines. Moreover, the Board of Elections' representatives were unable to state that these were furnished to the voting places in question or that they were ever displayed.

made well in advance of the election date, in order that the candidate may stand for election as scheduled.

Since this Court is not in session at the present time and will not resume its sessions until October 5, 1964, petitioner respectfully prays Your Honorable Court to give consideration to this matter on the Petition and Answer at the earliest possible moment, and to schedule a special session in advance of the opening of the fall session of this Court.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be granted and the decision of the Court below be reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Attorney for Petitioner.

EXHIBIT A.

Row C Tabulations—Jamestown Voting Machines

Ward	*Blatt*	*Roberts*	*Musmanno*
23	231	18	317
25	131	13	241
33	271	21	601
35	111	6	95
36	98	10	431
41	252	28	348
45	107	9	172
53	103	10	148
54	176	11	261
55	162	14	197
56	161	12	202
57	160	12	182
58	131	17	154
Totals	2094	181	3349

Column C Tabulations—Shoup Voting Machines

Ward	*Blatt*	*Roberts*	*Musmanno*
43	24	7	14
49	37	9	23
Totals	61	16	37

Appendix.

IN THE COURT OF COMMON PLEAS NO. 2 OF PHILADELPHIA COUNTY.

March Term, 1964. No. 5446.

IN RE: PETITION TO CANVASS ROW "C" ON THE VOTING MACHINES IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58, ON BEHALF OF ALL DEMOCRATIC CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION.

DECREE.

AND Now, to wit, this 8th day of June, A. D. 1964, after hearing and argument on June 4, 1964, the appeal is dismissed. The order of the Philadelphia County Board of Elections refusing to include the tabulation of figures on Row "C" as votes in the official primary count is affirmed.

By THE COURT:

VINCENT A. CARROLL,
Vincent A. Carroll, P. J.

IN THE COURT OF COMMON PLEAS No. 2 OF PHILADELPHIA COUNTY.

March Term, 1964. No. 5446.

IN RE: PETITION TO CANVASS ROW "C" ON THE VOTING MACHINES IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58, ON BEHALF OF ALL DEMOCRATIC CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION.

OPINION.

June 8th, 1964.

CARROLL, *P. J.*

ROBERT J. BRAY, JR., ESQ., GREGORY M. HARVEY, ESQ., Attorney for Candidate Genevieve Blatt.

LEVY ANDERSON, ESQ., First Deputy City Solicitor; EDWARD G. BAUER, JR., ESQ., City Solicitor, Attorneys for County Board of Elections.

ABRAHAM E. FREEDMAN, ESQ., BENJAMIN R. DONOLOW, ESQ., MARTIN J. VIGDERMAN, ESQ., Attorneys for Democratic County Committee.

This matter before the Court is an appeal by the Democratic County Committee from an order of the Philadelphia County Board of Elections refusing to include in the official count certain alleged votes recorded in blank spaces in the third row of certain of the voting machines utilized in the Primary Election of April 28, 1964.

All parties to this appeal agree that on the Jamestown machine utilized in all but two of the wards conducting a special congressional election, the names of the candidates

and levers were arranged in horizontal rows with levers appearing directly over the name. The vote was cast by depressing the lever across the card indicating the candidate's name. The rows were arranged as follows:

Row "A"—REPUBLICAN (listed the candidates for Republican primary nomination)

Row "B"—DEMOCRATIC (listed the candidates for Democratic primary nomination)

Row "C"—SPECIAL ELECTION

REPUBLICAN (no candidates' names were listed on this row except at the extreme right end thereof where the names of the Republican candidates in the special general elections appeared)

Row "D"—SPECIAL ELECTION

DEMOCRATIC (no candidates' names were listed on this row except at the extreme right end thereof where the names of the Democratic candidates in the special general elections appeared)

On the Shoup machine utilized in the 43rd and 49th Wards where a special general election was also held, the arrangement was identical with the Jamestown machine except that the rows were vertical columns designated I, II, III and IV respectively. The only other distinctive feature of the Shoup machine is that an "x" appears next to the candidate's name, if any, when the voting lever is depressed.

There being no distinction of substance between Row "C" of the Jamestown machine and Column III of the Shoup machine, all future discussion in this Opinion relating to the votes allegedly cast in Row "C" of the Jamestown machine will be equally applicable to the votes allegedly cast in Column III of the Shoup machine.

The County Board of Elections did not block the levers on the blank spaces in the "C" and "D" rows. Thus, the levers in these rows could be depressed in spite of the fact that no candidates' names in the primary election appeared on these rows. Because of this fact it was thought that many voters in attempting to vote for the democratic candidates whose names appeared on Row "B" inadvertently depressed the lever beneath the candidate's name, thus causing an alleged vote to be recorded in Row "C".

The Democratic County Committee filed its petition with the County Board of Elections on behalf of all of its endorsed candidates to have the alleged votes appearing on Row "C" counted as votes for the democratic candidate whose name appeared above this row. This petition was denied from which this appeal was taken.[1]

Appellee Genevieve Blatt, one of the candidates for the Democratic United States senatorial nomination, asks that the rule of the County Board of Elections be affirmed. The County Board of Elections was represented and heard at the hearing and argument by the City Solicitor and has filed a brief.

It should be emphasized at the outset that while all parties to this appeal place great emphasis on the close contest for the democratic senatorial nomination between Genevieve Blatt and Michael Musmanno, the sole duty of this Court is to determine the validity of the alleged votes appearing on the third row of the voting machines utilized in the wards conducting the special election. What effect such a determination might have in the Democratic pri-

1. The parties agree that while some alleged votes were cast in the fourth row "D", these are not at issue.

mary senatorial election or any other election is completely immaterial to this inquiry.

All parties have agreed upon the basic facts. Thus, it is agreed that registered Republicans voting in the primary election could vote on Row "A" but not on Row "B" as this row was locked immediately upon the voter declaring his party registration and before his entry into the voting booth. Conversely, registered Democrats voting in the primary election could vote on Row "B" but not on Row "A".

It is likewise agreed that irrespective of party and non-partisan registration, any voter entering the booth could depress the levers in Rows "C" and "D" because of the special election in the wards in question, but that each voter could vote only once in the United States senatorial primary.[2] Thus, if a registered Republican voted for a senatorial candidate in Row "A", his action locked all the other levers for the same office in the same or any other row, including the senatorial blank space of Row "C" and Row "D". This likewise applies to a registered democratic vote for United States Senator.

The right to vote is the highest privilege of a citizen in a democracy. It is in fact that which distinguishes a democracy such as the United States of America from all other forms of government. The democratic form of government is an expression of the popular will as evidenced by the electorate. To insure an accurate expression of the popular will, the voting mechanism must be regulated and a voter, by failing to substantially comply with such regulation disfranchises himself. Thus, a judicial pronouncement that a particular voter has not complied with the regulations does not disfranchise the voter, rather the voter by failing to observe the regulations has rendered his vote a nullity.

The Election Code provides with respect to voters at primary elections as follows: (1937, June 3, P. L. 1333, art. XII, § 1216(d). 25 Purdon's Stat. § 3056(d)):

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2. Or for any other office for which one nominee was to be elected.

> "(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed."

This section we believe expresses the clear legislative intent that an elector, to have his vote counted for the candidate of his choice, must do so by operating "the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed."

There is no warrant for deviation permitted, such as by depressing the lever in a different row even though the row be beneath or adjacent to the candidate for office.

The law of Pennsylvania is clear that when an elector fails to properly indicate his choice, his attempted vote is void. This principle was firmly established by the Pennsylvania Supreme Court in *In re Contested Election of John J. Flynn,* 181 Pa. 457 (1897). In that case certain electors improperly marked their paper ballots with one of the voters indicating his choice by placing an "x" in a box adjacent to a blank space and beneath the name of a candidate. The Court held that the ballots in question must be disallowed. In reaching this decision, the Court stated (p. 460): "The presumption is that the voter knows where and how to mark his ballot"; further that neither our courts nor our election officers are permitted to surmise the intention of the voters, and an elector's non-compliance with proper voting procedure is inexcusable. It should be noted that the Pennsylvania Court was not alone in adopting such a position. *O'Connell v. Mathews,* 177 Mass. 518, 59 N. E. 195 (1901); *Flanders v. Roberts,* 182 Mass. 524, 65 N. E. 902 (1903); contra *Thompson v. Boling,* 42 S. W. 2d, 321 (1931).

The appellant has attempted to distinguish the *Flynn* case on the basis it dealt with paper ballots rather than voting machines. This distinction is meaningless; it would be most illogical to disallow a vote in a blank space on a

paper ballot, yet allow the same type of vote to be counted when cast on a voting machine. The Pennsylvania Constitution prohibits any such distinction by virtue of its requirement that uniformity be observed within all laws regulating elections. ARTICLE VIII, Section 7. No distinction can be made in the principles governing the validity of a vote solely on the difference between a voting machine and a paper ballot. *Parente Appeal*, 390 Pa. 231 (1957). That the *Flynn* case rationale must be made applicable to voting machines is well illustrated by a recent Supreme Court decision. *Weber Appeal*, 399 Pa. 37 (1960). In that case electors improperly affixed stickers indicating their choice of a write-in candidate. The Court drew the analogy vis-a-vis write-in votes on paper ballots and machines, and disallowed the votes in question because they were misplaced on the machine. Thus, it is clear that an elector's failure to properly indicate his choice renders his vote a nullity regardless of the method used to cast the vote.

We are aware that not every technical violation of election laws by an elector is sufficient to invalidate his vote. Thus, where a voter properly indicates his choice on a ballot, he makes an effective vote despite the presence of marks in the nature of surplusage on his ballot. *Reading Election Recount Case*, 410 Pa. 62 (1963); *Norwood Election Contest Case*, 382 Pa. 547 (1955); *Bauman Election Contest Case*, 351 Pa. 451 (1945). Where a voter clearly indicates his vote for a write-in candidate, it is valid even though there is a variance with the actual name of the candidate. *McCracken Appeal*, 370 Pa. 562 (1952). *Harer's Petition*, 49 D. & C. 344 (1943). Where a voter properly indicates his choice of candidates on a voting machine, his vote is valid, regardless of the fact that the machine is defective and does not properly record his vote. *Miraglia Appeal*, 1 D. & C. 2d, 717 (1954); also see *In re Creedon*, 264 N. Y. 40, 189 N. E. 773 (1934); *McGallagher v. Bosarge*, 136 So. 2d 181 (1961). However, in each of these cases the elector clearly indicated the choice of his vote. Thus these Courts

were not confronted with the fundamental question; namely, what is the effect of an attempted vote in a blank space? This is a question of substance, not form.

The *Flynn* case conclusively establishes the answer to this question. We cannot surmise what the elector intended when he depressed the lever on a blank space on the "C" row. We must presume that the voter knew where and how to vote. In this connection it should be noted that sheets diagramming the voting machine are provided at each polling place. Further, accompanying each voting machine is a small replica model which is provided for the voter's edification. Therefore, we must conclude, as did the Court in the *Flynn* case, that the elector's depressing of a lever on a blank space in Row "C" constitutes inexcusable noncompliance with voting procedures on the part of the elector.

Our determination of the applicability of the *Flynn* principle to voting machine cases is supported not only in this jurisdiction (*In re Election in Third District of Ransom Township,* 38 D. & C. 609 (1940)), but also by the New York Courts. *In re Cosgrove,* 267 App. Div. 822, 46 N. Y. S. 2d 195 (1944); *Application of Lester,* 205 Misc. 67, 127 N. Y. S. 2d 272 (1953).

It is urged that the complexity of the voting machine caused all those "voting" on Row "C" to become confused in an identical manner. We cannot accept the conclusion that every voter committed the same mistake and pulled the lever below the name of the candidate of his choice. There are too many other possibilities. The parties agreed that it was possible that a registered Republican or Non-Partisan could have voted on Row "C" as well as a registered Democrat. Thus, there is a probability that electors other than registered Democrats voted on Row "C".[3] Even if

3. The attorneys for Genevieve Blatt offered testimony of eminent professors of mathematical psychology whose qualifications are unquestionable. This testimony was received subject to appellant's motion to strike. After hearing testimony of one of the professors, Robert Duncan Luce, the Court granted the appellant's motion. This testimony has no bearing on our determination of the issue before us.

only registered Democrats attempted to vote Row "C" there is no way to determine their intention in depressing the lever on Row "C". The elector might have intended a protest vote by depressing the lever on a blank space, or perhaps he was so confused he had no idea for which he was attempting to vote. Also, it is interesting to note that some electors even attempted to vote in the blank spaces on Row "D".

In any event the question of determining the intent of the elector is secondary to the basic issue of whether the elector actually cast a vote. There is no doubt under the law of this Commonwealth that an attempted vote in a blank space is a nullity. Thus, any figures compiled from the blank spaces on Row "C" cannot be counted as votes for any candidates.

Accordingly, we have dismissed the appeal and affirmed the order of the Philadelphia County Board of Elections.

By THE COURT:

VINCENT A. CARROLL, *P. J.*

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 329. January Term, 1964.

IN RE: PETITION OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA ON BEHALF OF ALL ITS ENDORSED CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58.

APPEAL OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA.

APPEAL FROM ORDER OF COURT OF COMMON PLEAS No. 2 OF PHILADELPHIA COUNTY, MARCH TERM, 1964, No. 5446.

ORDER.

FILED: July 27, 1964.

The Order of the lower Court—which affirmed the unanimous decision of the Board of Elections which held that votes in a so-called blank row were invalid and void—is affirmed. Opinions to be filed later.

THE COURT,

/s/ JOHN C. BELL, JR.,
Chief Justice.

Mr. Justice Jones and Mr. Justice O'Brien dissent.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 329. January Term, 1964.

IN RE: PETITION OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA ON BEHALF OF ALL ITS ENDORSED CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58.

APPEAL OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA.

APPEAL FROM ORDER OF COURT OF COMMON PLEAS NO. 2 OF PHILADELPHIA COUNTY, MARCH TERM, 1964, NO. 5446.

OPINION OF THE COURT.

(Filed Aug. 5, 1964.)

BELL, *C. J.*

This appeal involves the validity of votes cast in Row C—which is miscalled by the appellant a "blank" Row—on voting machines in 15 Wards in Philadelphia. An analysis of the facts and the law, as well as the prior decisions of this Court require an affirmance of the Order of the lower Court. That Order affirmed a unanimous decision of the Board of Elections * which held that votes in the so-called 'but miscalled) blank Row C were invalid and void.

* Composed of two Democrats and one Republican.

The Jamestown machine, which is involved in 13 Wards, was set up as portrayed by the photographic exhibit of the voting machine which is hereto attached and made a part hereof.

Row C (erroneously called by appellant "a blank row") is the Row here involved. *Row C was marked* on the left in relatively small capital letters "SPECIAL ELECTION", and in *enormous* capital letters "REPUBLICAN". A long line was then drawn through the middle of this horizontal Row with an arrow at the end pointing to a Republican candidate Edward H. Rovner, with a pointer or lever over his name. A photograph of the pertinent parts of the voting machine is attached and made a part hereof as above mentioned, and clearly shows how to vote for a Democrat, if that was the voter's desire.

Subsection (d) of Article XII, Section 1216 of the Election Code (Act of June 3, 1937, P. L. 1333, 25 PS 3056) provides as follows:

> "(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer * or knob, *upon or adjacent* ** to which the name of such candidate is placed."

If there had been, on the part of any voter, the slightest doubt concerning (a) the set-up of the voting machine, or (b) the sample ballot, or (c) the way to vote for the candidate of his choice, he could lawfully *and without the slightest difficulty* have obtained assistance, explanation, directions and instructions. Sub-sections (a) and (b) of Section 1216 of the F ction Code pertinently provide as follows:

> "(a) In districts in which voting machines are used, the election officers shall, with the aid of the diagram authorized by this act and the mechanically operated model, instruct each elector before he enters the voting machine booth regarding the operation of

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* Herein called and referred to as a lever.

** Italics throughout, ours.

the machine, and shall give the elector opportunity personally to operate the model."

"(b) If any voter, after entering the voting machines booth and before the closing of such booth, shall ask for further instructions concerning the manner of voting, any one of the election officers may give him such instructions, ..."

Furthermore, every voter was entitled to a large sample ballot which informed him *twice*—not in confusing language, as appellant asserts, but in *brief clear* language, with a crystally clear picture or diagram—what a careful look at the voting machine would have rendered unnecessary, viz., to vote for a candidate of his choice he should "turn down a pointer *over* the name of each candidate *in your own party row.*"

Whether the instructions on the sample ballot were ambiguous and confusing as appellant contends, or were crystal clear as we assert, can be easily determined by reading it. It pertinently provides: "GENERAL PRIMARY AND SPECIAL ELECTION, TUESDAY, APRIL 28, 1964 (large caps).

INSTRUCTIONS TO VOTER (Smaller caps).

2nd. Turn down a pointer *over* the name of each candidate *in your own party row* that you wish to vote for,

from this position

to this position

and leave it there.

(You will note on the Ballot that the Republican Party occupies the first horizontal row, the Democratic Party the second horizontal row . . . *Just remember to turn down a pointer over the name of each candidate you wish to vote for . . .*)"

Notwithstanding all of the foregoing, and although these (Jamestown) voting machines have a lever (pointer) right over or above the name of each Republican candidate to *pull down* if the voter wishes to vote for a Republican, and a similar lever in the row right over or above the name of the Democrat candidate of his choice, if he wishes to vote for a Democrat, appellant contends that if a voter votes *in a different party Row and in a different space* his vote must nevertheles be counted—and it must be counted as if it were cast in the Row and in the space and for the person whom the Court thinks the voter meant to vote for, *but didn't.* In every election there are always some or many ballots which are held to be void and thrown out and not counted. Appellant contends that there were nearly 6000 votes for the Democratic nominee for the United States Senate in 13 Wards. Even if this be accurate, when broken down it amounts to less than 12 to a Division and less than 7 to each voting machine used in the 13 Wards.

Some voters pulled down levers into the miscalled "blank" Row C—a Republican Row—*under three spaces in Row B* (the Row above C) *where a Democrat's name appeared and some levers under five spaces in Row B, where no candidates' names appeared in Row B.* These are the votes which are challenged in this appeal. No one knows or can determine—*except by guessing,**—whether such votes, or indeed any votes in the blank spaces in Republican Row C, represented (1) protest votes, or (2) non-partisan votes, or (3) Republican votes, or (4) Democratic votes, or (5) votes

* If the Election Board had locked (or blocked off) at a cost of $3,000. the blank spaces on Row C, it would have prevented those controversial votes.

for Rovner, or (6) "mistake" votes; but in any event, they were illegally cast and were clearly and undoubtedly *void* votes! Moreover, there were several voting machines in which *no votes were cast in Row B,* but votes were cast in Rows A and C. This would indicate that these particular voting machines were used only by Republicans and Non-Partisans. Nevertheless, appellant contends that the votes of all Republicans and Democrats and Non-Partisan and protesting and mistaken voters which were cast in this *Republican* Row C, (1) were valid votes, and (2) were cast in favor of the Democratic candidate whose name, if any, appeared above or *near* these blank spaces in Republican Row C. If the pointers which were pulled down into Republican Row C under the name of Blatt or Roberts or Musmanno, represented valid votes for the nominee in Democratic Row B, Genevieve Blatt would have received 2,094 votes, David B. Roberts 181 votes, and Michael A. Musmanno 3,349 votes.

What is the use of a State having election laws to govern an election, what is the use of having *clearly marked voting machines,* and Rows on the voting machines which were *clearly marked for a Republican candidate and for a Democratic candidate,* as well as clearly marked sample ballots, if a Court has the right and power—as appellant argues—to ignore and nullify all of these *and substitute its "guess"* as to whom a voter intended to vote for if he hadn't voted carelessly or hurriedly or absent-mindedly or stupidly or protestingly and illegally?

Furthermore, appellant's contention not only ignores the clear language of the Act and the clear set-up of the voting machine and the clear language of the sample ballots, but it also flies in the teeth of numerous prior decisions of this Court: *Weber Appeal,* 399 Pa. 37, 159 A. 2d 901; *Pfaff v. Bacon,* 249 Pa. 297, 95 A. 71; *Rodgers Contested Election,* 234 Pa. 512, 83 A. 476; *Dailey's Appeal,* 232 Pa. 540, 81 A. 655; *Gulick Appeal,* 192 Pa. 446, 43 A. 972; *Newberry Township Election,* 187 Pa. 297, 40 A. 822; *Contested*

Election of Flynn, 181 Pa. 457, 37 A. 523; *McCowin's Appeal (Little Beaver Township School Directors' Election),* 165 Pa. 233, 30 A. 955; *Lawlor's Contested Election,* 180 Pa. 566, 37 A. 92; *Redman's Election,* 173 A. 59, 33 A. 703.

These cases in principle directly rule the instant case and require this Court to hold such votes to be void. For example, in *Contested Election of Flynn,* supra, the law required the ballot to be marked *with an X opposite* the name of the candidate for whom the voter wished to vote. One ballot was marked in the proper space but with a 1 instead of an X. Another ballot was marked with an X in the vacant square to the right of but below the name of the candidate. The third ballot was marked with a 1 on the line and in the square opposit a candidate's name and with an X in the vacant square below, viz:

COUNCIL (mark one)	
Edward J. Burke (3 years)	1
	X

Notwithstanding the fact that the voters' intention was clear, the Court *voided all* three ballots, thereby giving the election to the apparent loser, and said:

". . . On one of the ballots in question there is no mark in the square opposite the name of the candidate, but there is a cross mark (X) in the square below it. Not one of these ballots is marked according to law. In McCowin's Appeal, 165 Pa. 233, the present Chief Justice, after quoting from sections 14 and 22 of the act, said: 'The marking mentioned in the last quotation is applicable only to candidates whose names are printed in the official ballot. *They cannot be legally voted for in any other way than by marking as* specified in said section.' . . . To hold that the ballots in question are valid is to set aside the plain provisions of the act prescribing the place and manner of 'marking,' and to substitute therefor the *surmises* of the

election officers and the courts respecting the intention of the voter.

"The presumption is that the voter knows where and how to mark his ballot. He is furnished on his request with a card of instruction and a specimen ballot, and if by reason of any disability he desires assistance in the preparation of his ballot he is permitted to select a qualified elector of the district to aid him in the preparation of it. . . . For reasons already stated we decline to hold that the mark of a one (1) in the square provided for the cross mark, or a cross mark (X) in the square below it has the effect of a cross mark (X) in the proper place for it. It follows that the ballots in question should have been rejected as illegal."

Weber Appeal, 399 Pa., supra, likewise controls in principle the instant case. *Weber Appeal* involved the validity of 16 stickers for a "write-in" candidate, because of the manner in which the stickers had been attached.

Chief Justice JONES, speaking for a unanimous Court, refused to permit the stickers attached to a card to be regarded as votes for the candidate whose name was on the stickers and pertinently said (page 44):

"The technicalities of the Election Law (and they are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed.* Thus it is, that any write-in or sticker which covers more of the ballot than the blank space pro-

* Justice COHEN quoted the *Weber* decision with approval in a recent dissenting opinion in *Reading Election Recount Case,* 410 Pa. 62, 66, 188 A. 2d 254, saying on pages 68 and 69: ". . . It is not important and of no great consequence that the government of the City of Reading may or may not be changed by the action of the majority—what is important and of great consequence is that our court has misread, misinterpreted and misapplied a clear legislative pronouncement. This is particularly true in the interpretation of the election laws which are basic to our democratic system. Hence, I am impelled to follow what Chief Justice JONES said in *Weber Appeal,* 399 Pa. 37, 44, 159 A. 2d 901, as recently as 1960: 'The technicalities of the Election Law (and they are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed.'"

vided therefor *invalidates* the vote for the office under which the write-in or sticker appears. See McCowin's Appeal and Lawlor's Appeal, supra. . . . *A misplaced* write-in or sticker, whether on a ballot or on a voting machine, *is of no legal efficacy whatsoever.* To hold otherwise would render facile the way to fraudulent voting and the thwarting of the electorate's will.

"What this court said in Rodgers' Contested Election, 234 Pa. 512, 519, 83 A. 476, is presently peculiarly apposite: 'While it may be that the Court in this instance correctly guessed the intention of the voter, yet the fifty-seven mutilated ballots were not marked in accordance with the instructions contained in the Act of Assembly, and under the well established doctrine in this State they should not have been counted; to permit the counting of such ballots would be a precedent fraught with grave dangers for the future."

In *Peck et al. v Lackawanna County Board of Elections*, 44 Lackawanna Jurist 97, Justice EAGEN of this Court, then a Judge in Lackawanna County, said that votes cast on a voting machine Row *in exactly the same way* as they were cast in the instant case *would be invalid.* That case involved a mandamus proceeding concerning the locking of a voting row, so that well intentioned votes which were carelessly or stupidly "levered" would not be invalidated.

In the course of his Opinion Judge EAGEN said (page 98): "The unfortunate and repeated occurrence of *a candidate losing hundreds of votes* intended for him by well intending voters pulling a lever *over a blank space under his name* will be corrected by the ballot label setup proposed for use in this election."

The only exceptions are two classes of cases, neither of which is applicable—(1) minor irregularities, especially if committed by election officials, and (2) cases where a voter *voted correctly* in the right Row and in the right square and in the right space, but then added something which was surplusage.

Appellant gives three major reasons to support its contention:

(I) General expressions in Opinions in entirely inapposite cases about protecting the vote and the voter. Every Judge favors protecting the voter if that can be done in accordance with the law. However, the generalized quotations which appear throughout appellant's brief appeared in cases which, we repeat, have no relevance and no pertinency to the questions here involved.

(II) Appellant next relies upon Article XII, Section 1216(d) of the Election Code of 1937, supra, which pertinently provides (as above noted): "At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, *upon or adjacent* [not below, or in the Row of the opposite party] to which the name of such candidate is placed."

The interpretation which appellant places upon the word "adjacent" would allow a voter to vote on one machine *both "upon" and "adjacent"* to a candidate, *or* "upon" *or* "adjacent" to a candidate. Furthermore, under appellant's theory, the word "adjacent" could mean (1) *above*, or (2) *below*, or (3) to the *left*, or (4) to the *right*, or (5) *near* to the candidate's name, which realistically is both impractical and absurd. Section (d) clearly and undoubtedly means that a particular voting machine can have a pointer or lever which can be pulled down *upon* the name of the candidate of his choice, viz., a Jamestown machine, or a different type of machine, viz., a Shoup machine which was used in a number of Wards. The Shoup machine has a pointer or lever on the right side of the candidate's name (and can be pulled to the left and just beside the candidate's name) and consequently is *adjacent* to the name of the candidate. The Legislative Act is both clear and realistic. The word "upon" clearly covers and, we repeat, applies to the present Jamestown machine: the word "adja-

cent" would cover and apply to a different machine known the Shoup machine, where the pointer and appropriat voting space is, we repeat, on the right of and next to the candidate's name.

(III) The third reason urged by appellant is its desire to carry out the *surmised* intention of the voters and thus avoid "disfranchising" many voters. Such alleged disfranchisement is more superficial than real. In the first place, if there was any disfranchisement the voters carelessly or unthinkingly disfranchised themselves. But even this alleged disfranchisement would apply only to a vote for a United States Senator; it does not affect or invalidate these voters' votes for other candidates on the ballot or on the loan question.

The test which appellant urges us to adopt—no matter how window-dressed or camouflaged, is a "guess" test—it isn't what the voter did that counts, *it's what the Court guesses he intended to do, but didn't.* Such "guess" test would undoubtedly often produce confusion, uncertainty and interminable delay in election cases, thus jeopardizing a candidate's opportunity for successfully campaigning; it would multiply "election litigation"; and it would sometimes produce chaos in Government.

Appellant attempts to justify its "guess" as to "the intention" of the voters by citing several cases which state that ballots must not be "thrown out", or "an election voided", or "voters disfranchised" for "mere minor irregularities" or "technical violations". Until this argument was urged upon the Court, no one ever dreamed that to vote Republican, intending to vote for a Democrat was "a minor irregularity" or "a technical violation". In spite of the appellant's guess, a vote for a Republican, or a vote *in a Row clearly marked "Republican"* is not a vote for a Democrat!

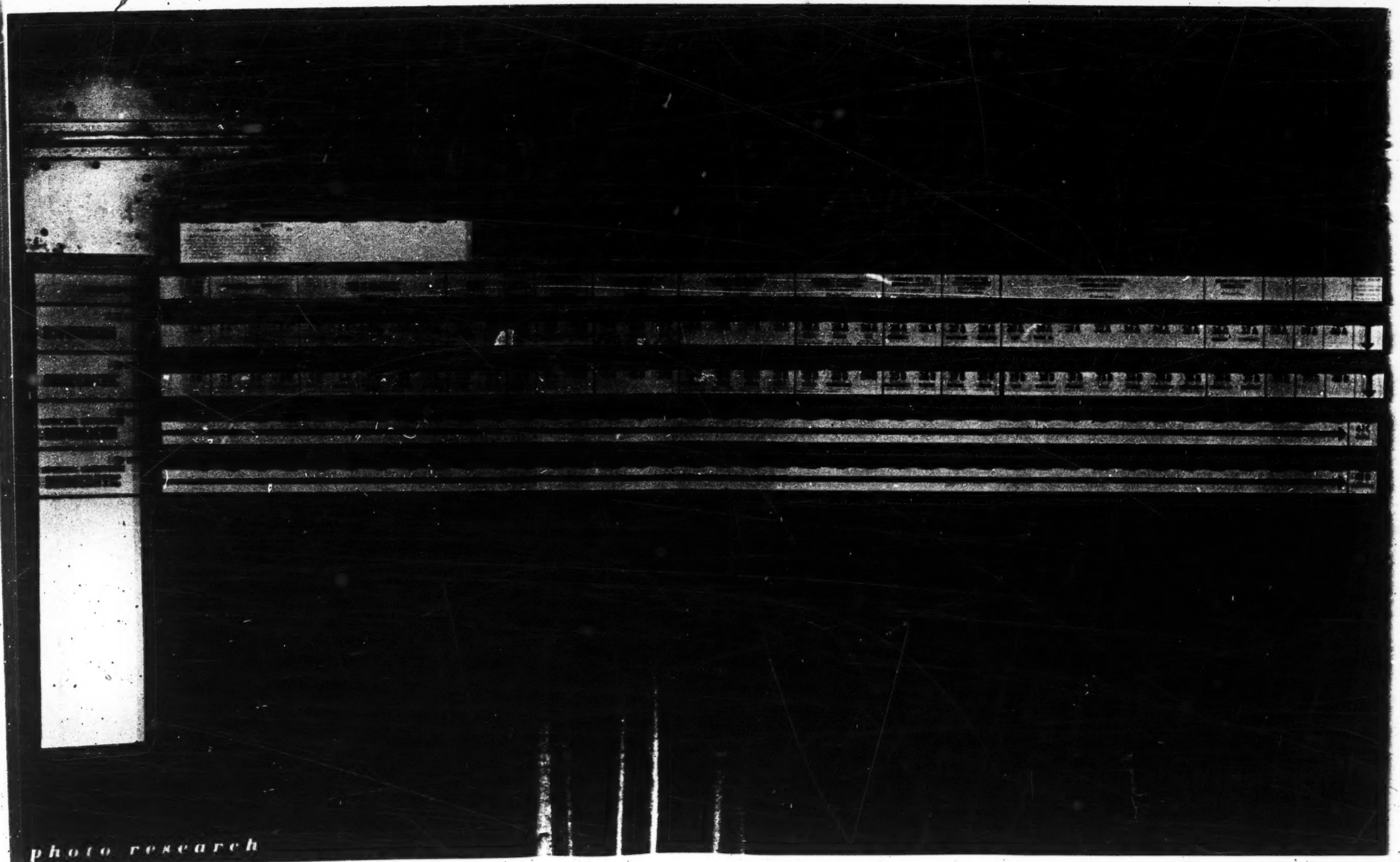
To summarize: In order to reach its conclusion, appellant misinterprets or ignores (1) the clear (pertinent) elec-

tion laws, and (2) the set-up of election machines which are clear to everyone except to a careless or an absent-minded or a hurried or an unthinking voter, and (3) the marked sample ballots which contain (a) very brief, clearly worded instructions, instructing a voter *twice* in clear, simple brief language which lever to pull *down* in order to vote for the Democrat or Republican candidate of his choice, as well as (b) a crystally clear illustration, and (4) the words at the left end of Row (C) which state in small capital letters "SPECIAL ELECTION" and *in very large capital letters* "REPUBLICAN", and (5) the line through the middle of Row C, with an arrow at the right end where the name of the candidate, Edward H. Rovner, appears, and (6) many prior decisions of this Court which, we repeat, in principle directly rule the instant case. Furthermore, appellant has not been deprived of any right ordained or guaranteed by the Constitution of the United States.

For each and all of these reasons, we affirm the Order of the Court below, which affirmed the unanimous decision of the Election Board.

Order affirmed.

Mr. Justice ROBERTS joins in the Opinion of the Court and also files a concurring Opinion. Mr. Justice EAGEN concurs in the result. Mr. Justice JONES files a dissenting Opinion in which Mr. Justice O'BRIEN joins.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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 329. January Term, 1964.

RE: PETITION OF DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA ON BEHALF OF ALL ITS ENDORSED CANDIDATES FOR NOMINATION AT THE APRIL 28, 1964 PRIMARY ELECTION IN WARDS 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 AND 58.

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, NO. 5446, MARCH TERM, 1964.

Entered June 8, 1964.

CONCURRING OPINION.

Filed August 5, 1964.

ROBERTS, *J.*:

I join in the opinion of the Chief Justice. An examination of the record facts, particularly of the voting machines which were set up as illustrated in the appended diagram, convinces me of the correctness of the result here reached. However, I do feel that I must add these observations.

This opinion is in no way a reflection upon any of the litigants. It is rather an expression of regret for the unforunate positions in which they have been placed by the inexcusable conduct of the County Board of Elections. Neither of the reasons offered by the Board for its failure

to prepare properly the voting machines by locking levers over blank spaces in rows C and D, as legally commanded, even approaches an acceptable explanation.[1] The Board improperly disregarded mandatory provisions of the Election Code and failed to perform clearly directed legal duties.

It is erroneous to assume that those voters who pulled levers in row C intended to vote for candidates whose names appeared above those levers but actually in row B. Such an assumption would be founded on nothing more than the exercise of retroactive clairvoyance as to what was intended on April 28 by 5,624 lever markings over blank spaces recorded on 908 voting machines in 512 election districts in 13 Philadelphia wards.

It is unmistakably evident from the ballot faces of the voting machines, as illustrated in the appended diagram, that votes for Democratic candidates whose names appear in the second horizontal row, marked "B", may be recorded only by the operation of levers above their names, as the hand pointer in that row clearly indicates. Moreover, there runs through the center of the blanks in row C (and also D) a heavy black line from column 1 through column 39 where an arrow points to the special election in column 40.

Likewise, the sample ballot contains four specific instructions which state with unmistakable clarity that to vote for a candidate, "Turn down a pointer over the name of each candidate in your own *party row* that you wish to vote for." (Emphasis in the original.) This instruction also advises that "the Democratic Party" occupies "the second horizontal row" (here row B), and in at least two other places the voter is cautioned that he may vote only for candidates of his party in the primary.

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1. The initial reason given for the failure to block all levers in rows C and D except for those to be used in the special election was that the Board did not wish to spend the $3,000 such action would require. At oral argument, the Board asserted that it had attempted to obtain covers for those levers approximately ten days prior to the election but that the manufacturer could not supply them in time.

It is an undisputed fact that levers in row C were operated in columns 1, 17, 18, 19 and others in which no names appeared either above in row B or below the levers in row C. Of particular interest is the use of columns 17, 18 and 19 in row C for the election of delegates to the *Republican* National Convention. If the "votes" recorded in columns 2, 3 and 4 of row C were validly cast for candidates in row B, so also were the "votes" in the remainder of row C, an obviously absurd conclusion.

It is conceded that all voters who entered the 908 voting machines in question could, irrespective of their party registrations, turn down levers in any of the columns in row C from column 1 through column 39 as well as the lever in column 40 for the special election. It is likewise undisputed that voters other than registered Democrats could and did operate levers in row C.[2] It would be fallacious to assume that since more Democrats appeared at the polls than the total votes cast for all Democratic senatorial candidates in rows B and C (asuming that the votes in C were for those candidates), only registered Democrats operated levers in row C.[3] Those voters who pulled levers in row C may have done so for the same reason as those Democrats (7,168) who failed or refused to vote for any of the senatorial candidates.

Nor can it be assumed that only registered Democrats voted in row C because it is unlawful to cross party lines

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2. In those divisions where separate machines were used for the Republican and Democratic primaries, respectively, votes were cast beneath the names of the Democratic candidates for the Senate in row C on the Republican voting machines. The proportion of such votes in row C to the total Republican vote on these machines was approximately the same as the proportion of row C votes to total votes on machines used for both parties. It should also be noted that some "votes" even appeared in columns 2, 3 and 4 of row D.

3. In the 15 wards in question (including two using the Shoup machines), 80,412 Democrats signed voters' certificates, whereas a total of only 73,244 levers were pulled down in both rows B and C combined in columns 2, 3 and 4. (Figures supplied by Democratic City Committee.)

in the primary, although the machines did not preclude such crossovers.[4] It may just as easily be assumed that the Democratic voters who intended to vote for the candidates followed the explicit voting instructions and pulled levers only in row B. Otherwise, the Legislature engaged in meaningless enactments of precautionary requirements to prevent crossover voting. The Legislature would have needed only to rely on a presumption that no one acts or votes contrary to the instructions and the Election Code.

To hold that the votes cast below the names of the candidates are valid would require the interpretation of "upon or adjacent" in Section 1216(a) of the Election Code as "*either* upon or adjacent." Under such a view, voters would be given the choice of pulling down the lever over the candidate's name, as the instructions provide, or pulling down the lever under the name, as appellants would have us hold. Appellants contend that the levers in row C, with no names appearing below them, are "adjacent" to the names in row B and would have us credit row B candidates with votes both above and below their names. The appearance of names in row C below the levers in row C would not make those levers any less "adjacent" to the names in row B. Thus, the absurd situation would result that in a general election, for example, the candidate in row A might also claim votes cast below in row B as "intended" for his name in row A and "adjacent" to it.[5]

Some concern has been voiced that by not counting the markings over the blanks in columns 2, 3 and 4 in row C

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4. An assumption that no crossovers took place is consistent with the "unwise" pre-election position of the Board of Elections that it would be unnecessary to lock rows C and D. However, following the election, the Board was satisfied that voters other than Democrats voted in row C and so found as a fact.

5. Even more confusion and uncertainty would result in a primary election in which the number of candidates for any office requires more than one row for listing their names.

Thus, the suggested interpretation of "upon or adjacent" would render useless thousands of voting machines in the Commonwealth.

and by not attributing those votes to candidates whose names appear in row B, 5,624 voters will be disfranchised. The application of this kind of paternalism would ignore the fact that 24 out of every 25 voters [6] who entered the voting booths in the districts in question voted correctly, regularly and in accordance with the instructions to voters. Also, no one knows who pulled the levers in row C, their party registrations, and the reasons for preferring to pull levers in row C rather than those in either rows A or B (it being admitted that all voters could operate levers in row C). Moreover, no one knows whether those who operated the levers in row C did so by mistake or by design, just as no one knows why 7,168 Democratic voters who entered the voting booths chose not to cast votes for any of the senatorial candidates.

Realistically, those voters who pulled improper levers in row C, columns 2, 3 and 4, are no more disfranchised than those who operated levers in other columns in that row where there were no names above or below. Thus, the voter who undertook to operate levers contrary to instructions and to established custom or who chose not to pull any lever at all is no more entitled to have his "vote" counted that the voter who failed to appear at the polls.

To give so much weight to so conjectural and expression of a minute minority (less than one out of 25) indeed would be an extreme overemphasis of the possible disfranchisement of 5,624 voters to the utter disregard of the more than 120,000 voters (both Republican and Democratic) in these districts who voted properly and in accord with the instructions on use of voting machines. This becomes even more apparent in light of the more than 1,000,000 votes properly cast without irregularity in the Democratic primary throughout the state.

Furthermore, it cannot truthfully be said that these 5,624 voters would be disfranchised since many may have

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6. More than 120,000 voters appeared at the polls in the wards here involved.

voted correctly for other candidates, on the loan question, and in the special election.[7]

Voting machines have been used in this Commonwealth for more than thirty years in the conduct of thousands of local, state and national election contests. No one has ever successfully contended that levers in one row may be utilized to vote for candidates whose names appear in another row.[8]

Under the circumstances here presented, our Court may not order row C "votes" to be counted for candidates whose names appear in row B.

Neither *Gray v. Sanders*, 372 U. S. 368, 83 S. Ct. 801 (1963), urged at argument, nor any earlier or more recent decision, compels, supports or even suggests a result contrary to that reached here. The Supreme Court did not say nor imply and surely did not intend that *invalidly* cast votes be counted under the doctrine of "one man, one vote," or any other theory just as that Court would not demand that

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7. The total of votes cast in columns 2, 3 and 4 of row C was much greater than the totals in columns further down the row.

8. In *Application of Lester*, 127 N. Y. S. 2d 272 (Sup. Ct. 1953), as in the instant case (except for the special election), the Republican candidates were on row A, Democratic candidates on row B, and no candidates on row C. There, as here, the law required that each lever on row C should be locked. In both cases, this was not done and constituted an absolute failure to perform a duty specifically commanded by statute. There, as here, when the machines were opened, it was found that some levers had been pulled in row C. It was maintained that since the votes cast in row C were in closest proximity to row B, it was to be inferred that those who pulled levers in row C did so with the intention of voting for the candidates in row B. The New York court rejected this contention, just as did the Philadelphia County Board of Elections, the court below, and now this Court. The New York court held that the inference there urged ". . . is not the only inference to be drawn. No one knows what voters cast their votes in Row C. If it were done by error, rather than by design, then not even the voters who did so, could now so state, since they are probably without knowledge that they did so. There is no way of telling whether those who cast their votes in Row C did so designedly, because they had no intention of voting for either of the two major parties' nominees." *Id.* at 276.

each voter who appeared at the polls cast a vote for each office. In this proceeding no claim was made by a voter or litigant that any voter was denied the right to vote or refused the opportunity to cast his ballot. So, too, no federal question—constitutional or otherwise—was raised, submitted or argued in this appeal. The record fails to reveal the presence of any such question.

We must not be misguided or misled by what is asserted to be possible disfranchisement of those relatively few voters who operated levers in a manner other than in accordance with the clear instructions and the election laws. Our concern must lie primarily with the preservation of the sanctity of the election process by giving effect to those votes properly cast. To do otherwise is to ignore the prescribed rules of the contest. Obviously, such action destroys not only the recognized machinery for expressing and recording the preference of voters but also imperils the whole orderly electoral process.

Another look at the appended diagram (of the face of the voting machine ballot) reinforces the correctness of the determinations of the Board and the court below. That additional look also further re-emphasizes the propriety and wisdom of affirmance here.

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APPEAL FROM ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, No. 5446 MARCH TERM, 1964.

Entered June 8, 1964.

DISSENTING OPINION.

Filed August 5, 1964.

JONES, *J.*

Convinced that the decision of the majority of this Court, which results in the disfranchisement of thousands of voters, is contrary both to law and common sense, I register my dissent.

The *stated* bases of the majority's ruling are: (1) the election law clearly proscribes the manner in which these disputed votes were cast; (2) the "set-up of [the] voting machines" was "clear to everyone"; (3) the "sample ballots" [herein called by the statutory term "specimen ballots"] were clearly worded and illustrated and they in-

structed the voters which lever to operate; (4) the words "Special Election, REPUBLICAN" to the left of Row C and the line drawn horizontally across Row C on the machines constituted clear instructions which were ignored by the voters; (5) the case law in this Commonwealth "directly rule[s] the instant case". In this opinion, I shall endeavor to demonstrate—not in the same order—the infirmity of each and all the bases upon which the majority opinion rests.

On this appeal we are called upon to determine the validity of certain votes allegedly cast for certain candidates in thirteen wards of the City of Philadelphia at the primary election held on April 28, 1964.

The disputed votes were cast upon voting machines,[1] not paper ballots. In the thirteen wards involved in this appeal a special election was conducted for representative in the U. S. Congress; by reason of that fact, two additional horizontal voting rows were added to each machine. The top row of each machine contained the designation of the various offices for which the electors were to select candidates, including that of representative in the U. S. Congress.[2] The second row—Row A—, at the extreme left whereof was the name "Republican"—, contained the names of the Republican candidates for the various offices and within each ballot label thereon were a numeral or numerals and the name or names of the Republican candidate or candidates for the particular office. The third row—Row B—, at the extreme left whereof was the name "Democratic"—, contained the names of the Democratic candidates for the various offices and each ballot label thereon

1. In *all* the wards involved in this appeal, the Jamestown type of voting machine—wherein the voting rows are arranged horizontally—was used. In the 43rd and 49th wards, which are not involved in this appeal but to which reference is made in the briefs, the Shoup type of voting machine—wherein the voting rows are arranged vertically—was used.

2. From the "ballot label" containing the name of the office "Representative in Congress" on the top row, an arrow, pointing downward, crossed Rows A and B and ended at Row C.

was arranged in the same manner as in Row A. The fourth row—Row C—, at the extreme left whereof appeared the words "Special Election, REPUBLICAN", contained no names whatsoever,[3] except that at the extreme right end thereof appeared the name of the Republican congressional candidate at the special election, and, across Row C, was an arrow which extended to the ballot label wherein appeared the name of the Republican congressional candidate. The fifth row—Row D—, at the extreme left whereof appeared the words "Special Election, DEMOCRATIC", was similar in all respects to Row C, except that at the extreme right thereof appeared the name of the Democratic congressional candidate. Upon this appeal, we are concerned only with the validity of the votes cast in Row C by the depression of the levers directly *above* Row C and *below* the names of the Democratic candidates in Row B, excluding, of course, votes cast in Row C for the Republican congressional candidate at the special election.

Between the top row and Row A and extending horizontally across the machine was a panel of levers marked "A"; between the second row—Row A—and the third row —Row B—was another panel of levers marked "B"; between the third row—Row B—and the fourth row—Row C —was another panel of levers marked "C". When a Republican voter entered the polling booth, the levers in panel "A"—*above* the names of the Republican candidates—were unlocked and the levers in panel "C"—*below* the names of the Democratic candidates—were unlocked but the levers in panel "B"—*belpw* the names of the Republican candidates—were locked. When a Democratic voter entered the polling booth, both the levers in panel "B"—*above* the names of the Democratic candidates—and the levers in panel "C"—*below* the names of the Democratic candidates—were unlocked so that a Democratic voter could

3. The majority opinion repetitively condemns the Committee's reference to Row C as a "blank row". The *fact* is that Row C *was* "blank" in that it did not contain the names of any candidates, except that of the Republican congressional candidate.

depress and operate *either*[4] the levers *above* or *below* the Democratic candidates' names. *However, no Democratic voter could vote more than once or for more than one candidate (where only one was to be nominated.)*

That which has given rise to this controversy is the undisputed fact that *all* the levers in the panel marked "C" were permitted to remain unlocked and susceptible of operation by the voters whereas *only* the lever in the panel marked "C" above the name of the Republican congressional candidate should have been permitted to remain unlocked.[5] *Complete responsibility for this improper condition of these voting machines must rest upon the City Board of Elections [the Board].* It is undisputed that the Democratic County Committee (the present appellant), *prior to the date of the primary election,* advised the Board

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4. *Both* the levers in panel "B" and in panel "C" *above* and *below* a particular candidate's name could not be depressed and operated so that thes voter could vote twice for such candidate. The majority opinion states: "The interpretation which [the Committee] places [upon the word 'adjacent' in the statute] would allow a voter to vote on one machine *both 'upon' and 'adjacent'* to a candidate . . . ." *No one* contends a voter could vote *both* above and adjacent to the candidate's name; it is undisputed that the set-up of the machines did not permit such dual voting.

5. Cf: Section 1107 of the Election Code (25 P. S. § 3007) which specifically provides: "No voting machine shall, upon any examination or re-examination, be approved by the Secretary of the Commonwealth, or by any examiner appointed by him, unless it shall, at the time, satisfy the following requirement: * * * (e) *It shall preclude each voter from voting for any candidate,* or upon any question, *for whom* or upon which *he is not entitled to vote,* an[d] from voting for more persons for any office than he is entitled to vote for, and from voting for any candidate for the same office or upon any question more than once, except in districts and for offices where cumulative voting is authorized by law. * * * (f) It shall be capable of adjustment by election officers, so as to permit each voter at a primary election to vote only for the candidates for non-partisan nomination, if any, and for the candidates seeking nomination by the political party in which he is registered and enrolled, if he is enrolled as a member of a political party, and *so as to preclude him from voting for the candidates seeking nomination by any political party in which he is not enrolled.*" (Emphasis supplied.)

of the improper condition of these machines and requested the Board to lock the levers in panel "C", except as to the Republican congressional candidate. The Board refused the committee's request and, as the court below sagely observed, "[t]hat was not a wise decision".[6]

After the election was held and the votes canvassed, it was then discovered that, in the thirteen wards involved in this appeal, 5624 voters had cast votes in Row C by the depression of the unlocked levers in panel "C" directly *below* the names of the Democratic candidates for the U. S. Senate listed in Row B.[7] The Board, inter alia, refused to count and credit such votes. An appeal was taken by the Committee to the Court of Common Pleas of Philadelphia County and that court upheld the action of the Board. From that order, the present appeal was taken.

The rationale of the court below, adopted in large part by the majority opinion, was: (a) that the failure of the voters to indicate their choice in accordance with the election statute rendered void their votes; (b) in reliance on *Contested Election of Flynn*, 181 Pa. 457, 37 A. 523, that "neither our courts nor our election officers are permitted to surmise the intentions of the voters, and [that] an elector's non-compliance with proper voting procedure is inexcusable"; (c) that the depression of a lever above a blank space on Row C constituted an inexcusable non-compliance with statutorily-required voting procedure on the part of

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6. Counsel for Miss Blatt (the appellee) contends the Committee should have applied for relief to the courts and that, not having done so, the Committee cannot now be heard to complain. Appellee fails to take into account that she had equal opportunity to act and did not do so. If any fault is to be imputed to the Committee in this respect, appellee must share in it.

7. The majority opinion seeks to minimize the result of its ruling by stating that the "number of questioned votes" was "less than 12 to a Division and less than 6 to every voting machine used in the fifteen [should be thirteen] wards". What the majority opinion fails to state is that there were 908 voting machines and 512 election districts in the 13 wards involved in this appeal.

the voters;[8] (d) that the attempted vote in a blank space on Row C constituted a nullity.

At the outset, reference must be made to the respective positions taken by the Committee and appellee. The Committee contends: (1) that the intent of the voters, if it can be ascertained, should control, that it is to be presumed that a vote is validly cast and that the disfranchisement of voters should not be permitted because of minor irregularities or technical violations of the election procedures; (2) that the intent of the voters who depressed the levers in panel "C" is clear i.e., to vote for the particular candidates whose names appeared directly *above* the levers; (3) that, in ascertaining the intent of the voters, consideration must be given to the fact that the voting took place on complicated voting machines upon which, through the election officials' inaction, a condition had been permitted to exist whereby the voters could depress either the levers in panel "B" or panel "C", and, under such circumstances, courts and canvassing boards should exercise great liberality in determining the validity of votes cast in Row C; (4) in the absence of evidence to the contrary and in view of the presumption that voters vote legally, the votes cast by the depression of the levers in panel "C" must be regarded as having been cast by Democratic voters rather than by "cross over" Republican and Non-Partisan voters. Appellee takes the position: (1) that the votes recorded in Row C are void because they were not recorded in the proper voting space; (2) that the case law, cited by the Committee, is inapposite because such case law dealt with votes cast in the proper voting space whereas in the case at bar the votes were cast in an improper space; (3) that the depression of the levers on the blank spaces in Row C constituted an "inexcusable non-compliance" with proper voting procedures; (4) that the record indicates "cross

8. The court below, significantly, failed to note that the lever which the voters depressed was directly *below* the name of a Democratic candidate.

over'' voting by Republican and Non-Partisan voters whose votes cannot be segregated from votes cast by Democratic voters and, therefore, all the votes cast in Row C must be declared void.

Certain matters are beyond question. First, there is neither allegation nor proof of any fraud on the part of the voters, the election officials, or anyone else. Second, this controversy would not be before us were it not for the impact of the validity of these votes on the contest for the Democratic nomination for the U. S. Senate.[9] Third, a proper setup of the voting machines would have insured that the levers in panel ''C'' were locked and placed in a condition wherein they could not have been depressed[10] and the sole responsibility for this improper setup of the machine rests with the Board. Fourth, the votes recorded in Row C were made by voters who depressed the levers in panel ''C''. Fifth, the total number of votes in Rows B and C in the Democratic senatorial contest was considerably less than the total number of Democratic voters who entered the voting booths, i.e., those voters who signed the requisite affidavits and voted. Lastly, an examination of the face of the voting machines, with particular reference to the ballot label wherein the names of the Democratic senatorial candidates appeared, indicates that the upper levers—those in panel ''B''—and the lower levers—those in panel ''C''—were equidistant vertically from the names of the respective candidates and in exact juxtaposition horizontally to such names.

Initially, we must inquire whether the operation by the voters of the levers in panel ''C'', *directly below* the can-

9. 5624 votes were cast in Row C by the depression of levers in panel "C" *below* the names of the three candidates for the Democratic nomination for the U. S. Senate. Of such votes cast, a tabulation shows: 2094 for Genevieve Blatt, 181 for David Roberts and 3349 for Michael Musmanno. It is highly significant that, throughout all the voting districts involved in this appeal, there was a *definite pattern* of voters utilizing the levers in panel "C" to cast their votes.

10. Except, of course, the lever above the name of the Republican congressional candidate.

didates' names, violated the election statute and to that end we must examine the election statute to ascertain *how* a voter must vote on a voting machine.

Section 1216 of the Election Code [11] purports to answer that question, its heading being "Instructions of voters and manner of voting in districts in which voting machines are used." Section 1216(a) provides for the instruction of electors by the election officials "with the aid of the diagrams authorized by [the] act and the mechanically operated model." [12] Section 1216(d) provides the *manner* of voting on a voting machine at a primary election: "At primaries, he [the voter] shall vote for each candidate individually by operating the key, handle, pointer or knob, *upon or adjacent to which the name of such candidate is placed.*" (Emphasis supplied.) In construing Section 1216(d), we must recall that which this Court said in *Independence Party Nomination*, 208 Pa. 108, 112, 57 A. 344: "The constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument. It is an individual right and each elector is entitled to express his own individual will in his own way. His right cannot be denied, qualified or restricted, and is only subject to such regulation as to the manner of exercise, as is necessary for the peaceable and orderly exercise of the same right in other electors. The constitution itself regulates the times and in a general way the method, to wit: by ballot, with certain specified directions as to receiving and recording it. Beyond this the legislature has the power to regulate the details of place, time, manner, etc., in the general interest for the due and orderly exercise of the franchise by all electors alike. Legislative regulation has been sustained

11. Act of June 3, 1937, P. L. 1333, art. XII, Sec. 1216, 25 PS § 3056.

12. In the case at bar, small demonstration machines were furnished to the voting places but such machines did not contain Rows C and D. The voting machines themselves contained no instructions and the sample ballots only added to the confusion, see, infra.

on this ground alone: [citing a case]. Anything beyond this is not regulation but unconstitutional restriction. It is never to be overlooked therefore that the requirement of the use of an official ballot is a questionable exercise of legislative power and even in the most favorable view treads closely on the border of a void interference with the individual elector. *Every doubt, therefore, in the construction of the statute must be resolved in favor of the elector".* (Emphasis supplied.)

The approach to a construction of Section 1216(d) of the Election Code must begin with an examination of our statutory law, past and present, prescribing the manner in which an elector must cast his vote for a candidate whose name appears on the ballot. It must be noted, of course, that until the passage of the Voting Machine Law of 1929 (Act of April 18, 1929, P. L. 549), all voting was by paper ballot and, therefore, the pre-1929 statutory law referred only to voting by such method.

Section 14 of the Act of 1893 (Act of June 10, 1893, P. L. 419) provided, inter alia, that the ballot should "be so printed as to give to each voter a clear opportunity to designate his choice of candidates by a cross mark (x) *in a square of sufficient size at the right of the name of each candidate and inside the line enclosing the column",* (Emphasis supplied), and Section 22 of that act provided, inter alia, that the voter should prepare his ballot by placing "a cross (x) . . . *opposite the name* of the candidate of his choice for each office to be filled, according to the number of persons to be voted for by him for each office, ..." (Emphasis supplied.) This act *clearly* indicated *how* and *where* on the ballot the voter must cast his vote, i.e., the voter was required to place a cross (x) in a square to the right of and opposite the name of the candidate of his choice.[13]

13. Construing this statute, this Court held that a *strict* compliance was required to validate a vote: *Contested Election of Flynn,* 181 Pa. 457, 37 A. 523, (where on one ballot a "1" rather than an "x" was placed, on another ballot an "x" was placed to the right of

Sections 14 and 22 of the 1893 statute were amended by the Act of 1903, (Act of April 29, 1903, P. L. 338).[14] However, that statute, insofar as presently pertinent, did not change the manner of casting a vote as required by the 1893 statute.[15]

In 1919, the legislature again amended Section 22 of the 1893 statute: Act of July 9, 1919, P. L. 829.[16] As this Court said: "This amendment of 1919 was enacted to give effect more adequately to the intent of the voter; it is remedial in purpose and should be liberally construed to the end intended.": *Gegg's Election*, 281 Pa. 155, 160, 126 A. 260. So far as presently pertinent, the 1919 statute provided that a voter "may . . . make a cross-mark in the square to the right of any individual candidate whom he favors" and, where more than one candidate is to be elected to any office, "the voter shall, if he desires to divide his vote among candidates of different parties, make a cross (x) mark in the appropriate square to the right of each

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the candidate's name but not in the square opposite the candidate's name and on a third ballot where a "1" rather than an "x" was placed in the square opposite the name of the candidate and an "x" placed to the right of the name but not in the square opposite the name and all three ballots were held void). See also: *McCowin's Appeal*, 165 Pa. 233, 30 A. 955; *Redman's Election*, 173 Pa. 59, 33 A. 703; *Newberry Township Election*, 187 Pa. 297, 40 A. 822. Cf. *Gulick Appeal*, 192 Pa. 446, 43 A. 972.

14. The 1903 statute used the words "voter may", instead of "voter shall", but this Court held that such change of language was immaterial: *Dailey's Appeal*, 232 Pa. 540, 81 A. 655.

15. Subsequent to the 1903 statute, this Court continued to require a literal and strict compliance with the manner of voting prescribed in the statute: *Dailey's Appeal*, supra; *Rodgers' Contested Election*, 234 Pa. 512, 83 A. 476; *Pfaff v. Bacon*, 249 Pa. 297, 95 A. 71. In *Pfaff*, it is interesting to note the language of Mr. Justice Mestrezat, in dissent, that "a ballot cannot be rejected unless it is so marked as to make it impossible to determine the voter's choice. This is the only ground or reason for which a vote may not be counted." (p. 312).

16. The Act of June 22, 1931, P. L. 628, further amended Sections 14 and 22 of the 1893 Statute but in a manner not presently pertinent.

candidate for whom he desires to vote . . ." The pertinent sections of the 1893 statute were finally repealed by the Election Code of 1937[17] and Section 1215(b) thereof now provides the manner of voting on paper ballots, i.e., that a voter, at a primary election, "shall vote for the candidate of his choice for nomination or election, . . . by making a cross (x) or check (✓) in the square opposite the name of the candidate. . . ."

Such examination of our statutory law, past and present, on the manner of voting *by the use of paper ballots* indicates beyond question that the legislature *clearly* directed both *how* a voter should vote, i.e., originally by a cross, but now by a cross or check, and *where* such vote should be marked, i.e., in the square opposite the candidate's name, etc. Therefore, in considering our case law dealing with irregularities in the manner of voting on paper ballots, it must be kept in mind that the legislature has *always* clearly declared both *how* and *where* votes on paper ballots must be cast.

However, an examination of the legislative direction *as to the manner of voting on voting machines* reveals an entirely different situation. In making this examination it must be noted that voting machines, whether the rows thereon be arranged vertically or horizontally, contain "ballot labels", i.e., "the cards, papers or other material, containing the names of offices and candidates . . ." (Election Code of 1937, art. XI, § 1101, 25 PS § 3001), and these "ballot labels" are comparable to the squares on the paper ballots.

The Voting Machine Act of 1929, now repealed by an Election Code of 1937, was silent on the manner of voting a ballot on a voting machine. At the present time the manner of voting on voting machines is governed, insofar as primary elections are concerned, by Section 1216(d) of the

17. The Act of June 3, 1937, P. L. 1333, art. XII, § 1215, as amended by the Act of January 8, 1960, P. L. (1959), 2143, § 3, 25 PS § 3055.

Election Code (25 PS § 3056) which, I repeat, provides, in pertinent part: "At primaries, he [the voter] shall vote for each candidate individually by operating the key, handle, pointer or knob,[18] upon or adjacent to which the name of such candidate is placed." That provision *clearly* states *how* the voter shall vote, i.e., by operating the lever, but does it provide with any degree of clarity *where* or *by which lever* the voter shall vote? The phrase "upon or adjacent to which the name of such candidate is placed" is clearly adjectival in nature, descriptive of the lever which the voter shall operate and limits and restricts the voter to that lever which is "upon or adjacent to" the candidate's name. The word "or" is used as a disjunctive particle that marks an alternative and differentiates between that lever which is "*upon*" and that lever which is "adjacent to".[19] The use of the word "or" together with the fact that "upon" and "adjacent" are not only not synonymous but differ in meaning[20] point to a possible legislative intent that either

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18. In this opinion I have adopted the language of the parties and refer to the "key, handle, pointer or knob" as the lever.

19. *Dilks v. Flohr Chevrolet*, 411 Pa. 425, 431, 192 A. 2d 682; *Marnell v. Mount Carmel Jt. School System*, 380 Pa. 83, 88, 110 A. 2d 357.

20. Words of a statute must be construed "according to their common usage . . .:" Statutory Construction Act of May 28, 1937, P. L. 1019, art. III, § 33, 46 PS § 533; *Breslow v. School District of Baldwin*, 408 Pa. 121, 182 A. 2d 501. In *Commonwealth v. Lanzetti et al.*, 97 Pa. Superior Ct. 126, 128, it was said: ". . . we are not justified in going so far as to hold that the word 'upon' is to be construed as 'adjacent'." "Upon" has been defined as "upward as to be on", "on or upon one", "on the surface": Webster's New International Dictionary, (2d Ed.) p. 2800. "Adjacent" has been defined as "lying near or close to; sometimes contiguous, neighboring. It implies that two objects are not widely separated though they not be actually touching": Black's Law Dictionary. "Adjacent" has been construed in the courts: *Allentown v. Wagner*, 27 Pa. Superior Ct. 485, 493 ("implies nearness to but not necessarily actual contact"); *Camp Hill Borough*, 142 Pa. 511, 517, 21 A. 978 ("adjoining or contiguous"); *Hanifen v. Armitage*, 117 F. 845 ("lying near, close, or contiguous, but not actually touching").

one of two levers may be operated by the voter, i.e., that lever "upon . . . which the name of [the] candidate is placed" or that lever "adjacent to which the name of [the] candidate is placed.[21] In my opinion, the legislative description of the lever to be operated by the voter is vague, uncertain and ambiguous. From the language employed it is arguable that "upon" refers to the lever directly *above* the name of the candidate and that "adjacent" refers either to the lever *below* or the lever *above* the name of the candidate because both levers are "adjacent" to the candidate's name. This loosely and carelessly drawn piece of legislation is not only uncertain and ambiguous but confusing. At best, the legislative direction in Section 1216(d) is doubtful and, in such event, the statute must be construed in the manner most favorable to the voter: *Independence Party Nomination*, supra. In view of the uncertain and dubious language of the statute, how can we now hold that the operation of the lower levers in panel "C", even though such operation recorded the votes in the blank spaces on Row C, constituted a *clear* violation of, or a *clear* non-compliance with, the language of Section 1216(d) of the Election Code so as to justify the disfranchisement of upwards of 5000 voters?

Moreover, even the most cursory comparison of the several statutes, past and present, prescribing the manner of voting on paper ballots with the statutory provision prescribing the manner of voting on voting machines reveals that the case law on paper ballots and irregularities in voting thereon cannot be considered as precedents in deter-

21. The majority opinion says the statute is "both clear and realistic" and that the "word 'upon' clearly covers, and, . . . , applies to the present Jamestown machine; the word 'adjacent' would cover and apply to a different machine known as the Shoup machine . . . ." Such construction is completely unsupported by *any* evidence whatsoever. When the election statute was enacted were there Jamestown and Shoup machines? If there were, did the legislature have knowledge of such fact? This is a startling example of statutory construction by judicial wishful thinking.

mining the manner of voting on voting machines and irregularities in such voting.[22]

However, assuming, arguendo, that the operation of the levers in panel "C" was a technical non-compliance with Section 1216(d) and assuming that the intent of those who so operated the levers can be ascertained, does the fact of such technical non-compliance with the statute *per se* invalidate these votes? The court below and the majority of this Court equate non-compliance with the election statute with invalidity of the votes, *regardless of the intent of the voters;* in so doing, in my opinion, they err.

From 1893 until the passage of the 1919 statute our courts did maintain a rigid and unbending rule which, in effect, rendered invalid any votes cast which were not in strict and literal compliance with the statute, regardless of whether the intent of the voter could be ascertained from the ballot: *McCowin's Appeal,* supra; *Redman's Election,* supra; *Contested Election of Flynn,* supra; *Newberry Township Election,* supra; *Dailey's Appeal,* supra; *Rodgers' Contested Election,*[23] supra. The rigidity of such a rule is particularly difficult to understand since Section 27 of the 1903 statute, at least impliedly, granted recognition and consideration to the ascertainment of the voter's intent.[24]

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22. *Pfaff v. Bacon,* 249 Pa. 297, 95 A. 71; *Rodgers' Contested Election,* 234 Pa. 512, 83 A. 476; *Dailey's Appeal,* 232 Pa. 540, 81 A. 655; *Gulick Appeal,* 192 Pa. 446, 43 A. 972; *Newberry Township Election,* 187 Pa. 297, 40 A. 822; *Contested Election of Flynn,* 181 Pa. 457, 37 A. 523; *McCowin's Appeal,* 165 Pa. 233, 30 A. 955; *Lawlor's Contested Election,* 180 Pa. 566, 37 A. 92; *Redman's Election,* 173 Pa. 59, 33 A. 703, relied on by the majority, all dealt with voting by paper ballots, and, in no sense, control the case at bar.

23. In *Rodgers,* this Court, even though it conceded that the court below had ascertained the voter's intent, refused to accord any weight to such intent.

24. Inter alia, Section 27 provided: "If a voter has marked his ballot otherwise than directed by this act, so that for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office; . . . ."

However, since the passage of the 1919 statute this Court properly has been more liberal and has given recognition and weight to the intent of the voter, once ascertained. In *Knight v. Coudersport Borough*, 246 Pa. 284, 289, 92 A. 299, we approved that which was said in Black on Interpretation of Laws: "If the law declares a specified irregularity to be fatal, the court will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a full and free expression of the popular will. If it had, the regularity is held to vitiate the entire return; otherwise, it is considered immaterial." See also: *Fish's Election*, 273 Pa. 410, 117 A. 85. *Gegg's Election*, supra. The attitude of our Court in this area of the law, in recent times, has been well epitomized in *Norwood Election Contest Case*, 382 Pa. 547, 552, 116 A. 2d 552: "Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." In *McCracken Appeal*, 370 Pa. 562, 566, 88 A. 2d 878, we said: "In any disputed election, nothing can be more vital towards the accomplishment of an honest and just election than the ascertainment of the intention of the voter." See also: *James Appeal*, 377 Pa. 405, 408, 105 A. 2d 64; *Reading Election Recount Case*, 410 Pa. 62, 66, 188 A. 2d 254. If, from the ballot cast, the intent of the voter in his choice of a candidate for office can be ascertained, then such ascertained intent must be granted full recognition and the ballot counted, even though there be a technical non-compliance with the election statute. See: *Arnold Borough Contested Election*, 307 Pa. 536, 161 A. 536.[25]

25. Such is the rule in other jurisdictions: *Green v. Independent Consolidated School District*, 252 Minn. 36, 89 N. W. 2d 12; *Redfearn v. Board of State Canvassers*, 234 S. C. 140, 107 S. E. 2d 10; *Hall v. Barton*, 290 Mass. 476, 195 N. E. 753; *Turner v. Board of Education*, Ky. 266 S. W. 2d 321; *Re Creedon*, 264 N. Y. 40; *Thompson v. Boling*, 240 Ky. 340, 42 S. W. 2d 321.

What was the intent of the voters who operated the levers in panel "C"? In my opinion, such intent was to vote for the Democratic senatorial candidates whose names appeared *directly above* the levers operated. When a voter depressed the lever in panel "C" *directly below* the name of Genevieve Blatt, he intended to vote for Miss Blatt; likewise, as to those voters who depressed the levers *directly under or below* the names of David Roberts and Michael Musmanno. In *Peck et al. v. Lackawanna County Board of Elections,* 33 Lack. Jurist, 97, Judge (now Mr. Justice) Eagen fully recognized that such was the intent on the part of voters pulling a lever *under* the name of a candidate. As a matter of fact, the court in *Application of Lester et al.,* 127 N. Y. S. 2d 272, so heavily relied on by appellee, conceded that "practical experience has demonstrated that there may be much force in [the] argument" that those who cast their votes in Row C of a voting machine do so in error by pulling the lever *below* rather than that *above* the candidate's name, at the time intending to vote for such candidate.

The majority opinion, labeling the finding of the voters' intent as a "guess", concludes that such a "guess" as to intent, if permitted to stand, would occasion dire results perhaps even "chaos" in government. With that I thoroughly disagree. In many areas of the law courts must and do ascertain, from language and/or conduct, the intent of an individual. As an example, time and again we have said that, in the construction of wills, the "polestar" is the intent of the testator and we then have proceeded, by placing ourselves in the "armchair" of the testator and by examining the language and scheme of his will and the surrounding circumstances, to ascertain what the testator intended: *Woodward Estate,* 407 Pa. 638, 640, 182 A. 2d 732. Was such intent arrived at by "guess", speculation or conjecture? I think not. In the case at bar, believing as I do that in election cases we must give recognition to the intent of a voter if ascertained, why cannot we place our-

selves in the position of a voter in the polling booth, examine what confronted him and what he did and, considering all the surrounding circumstances, ascertain his intent? Granted that in construing a will we have principally the language of the testator before us and we determine what he meant by what he said, it seems to me that we can just as well determine what a voter meant by what he did; conduct can be just as eloquently communicative of intent as the written word. The ascertainment of the voters' intent is not a "guess"; it is an opinion arrived at after a careful marshalling of all the data necessary to the formulation of such opinion.

If the voters by depressing the levers did not intend thereby to vote for the candidates whose names appeared *directly above,* such levers, what did they intend? The majority opinion offers several alternatives, i.e., such votes were "protest" votes, "cross-over" votes or "mistake votes". If there were "protest" votes, against whom or what was the protest? On this subject the record is silent and the majority opinion furnishes no support for its suggestion. Were these "cross-over" votes? Appellee contends that Republican and Non-Partisan voters "crossed over" and registered their votes for Democratic candidates. In support of this contention, appellee points out that the levers in panel "C" were unlocked to Republican and Non-Partisan voters as well as Democratic voters, that on 17 voting machines used only by non-Democratic voters a total of 60 votes appeared in the senatorial columns of Row C and that, by a projection of the ratio shown on those machines to all the machines in the thirteen wards, the conclusion must be reached that approximately 1378 of the 5624 votes in Row C were cast by Republican or Non-Partisan voters.[27] In this connection, it must be noted

27. This is sheer speculation. There was no evidence that 17 voting machines were used only by Non-Democratic voters. This was a presumption indulged in by the appellee and unfortunately accepted by the majority. Courts "cannot act on conjecture." (Matter of Creedon, 264 N. Y. 40). It could well be that the 60

that the total number of votes cast in Rows B and C were less than the total number of Democratic voters who actually voted. If appellee's contention is sound, then over 1300 Republican or Non-Partisan voters directly violated the election laws by participating in a Democratic party primary. Such a contention, unsupported as it is by any proof, falls in the face of the presumption long adhered to by this Court that, when a person acts, it is to be presumed that he acts in compliance with, not in violation of, the law: *Simon Election Case*, 353 Pa. 514, 521, 46 A. 2d 243. To paraphrase the language of Chief Justice Maxey in *Simon*, supra, illegality cannot be proved by merely showing illegality-facilitating circumstances. What appellee—and now the majority of this Court—urges is that it is *possible* that there were "cross over" votes cast in Row C; I would remind appellee and the majority of this Court that we said in *Winograd et al. v. Coombs et al.*; 342 Pa. 268, 271 A| 2d 315: "Judicial decrees cannot be founded on possibilities". Were these "mistake" votes? On this there is absolutely no evidence whatsoever, and I will not classify, simply by rote, the 5000 odd votes cast in this manner as "mistakes" and reject them out of hand. If any conclusion is a pure "guess", it is the majority's conclusion that the votes in Row C were in "protest" or "cross-over" or by way of "mistake". The fallacy of the majority's position in this respect is self-evident: its complete rejection of the factual date on this record. What is even more astounding is the clear implication in the majority opinion that, even if the voters' intent were ascertained, such intent would not be recognized because voters, in the manner of their voting, failed to comply with the letter of the election statute!!

Moreover, we cannot, and must not, overlook the fact that it was the carelessness on the part of the Board in permitting the levers in panel "C" to remain unlocked

---

votes (about 3 to a machine) were cast by voters, who, like the rest of the 5624 voters, voted beneath the name of the candidate instead of above the name.

and susceptible of operation which created the condition on the basis of which we are now asked to invalidate these 5624 votes. Over eighty years ago, this Court in *Contested Election of Wheelock,* 82 Pa. 297, 299, said: "If we, by our decision, should permit the carelessness . . . of [election] officers . . . to defeat the election . . . , we would thus make the people suffer for an act in which they did not participate, and which they did not sanction." More recently, we arrived at the same result in *Simon,* supra.

Appellee asks this Court to invalidate the 5624 votes cast in Row C in the Democratic senatorial contest as well as all the other votes cast in Row C for other candidates. In so doing, reliance is placed principally on *Flynn,* supra, *Weber Appeal,* 399 Pa. 37, 159 A. 2d 901, and *Application of Lester et al.,* 127 N. Y. S. 2d 272. Factually, both *Flynn* and *Weber* completely differ from the case at bar and are, therefore, inapposite. Moreover, *Flynn* dealt with statutory provisions applicable to paper ballots, not voting machines, and *Flynn* represents a rule of extreme rigidity no longer followed by this Court. Even if *Lester* had been determined under statutory provisions similar to the statutory provisions as to voting-machine voting in Pennsylvania—which it was not—even so I am neither bound by *Lester* nor impressed by its rationale.

Great emphasis is placed by the majority on the specimen ballots which, in the majority view, contained "clearly worded instructions" and a "crystally clear illustration" on the manner of voting, instructions *allegedly ignored* by the voters. The printing and delivery of specimen ballots is covered by the Election Code (art. X, § 1007) but it is significant that when the legislature provided the instructions to be given by election officers to voters on voting machines, specimen ballots were not mentioned (Election Code, § 1216(a), (b)). To say, as does the majority, that the voters *ignored* the specimen ballots clearly implies that the voters *saw* these ballots but there is no evidence such

ballots either were seen by, or available to, the voters. As a matter of fact, even the legislature did not contemplate that each voter receive a specimen ballot because it required delivery of specimen ballots to the election officers, only in the ratio of one specimen ballot for each five official ballots. Moreover, specimen ballots "are supposed to be like the [official ballots] in every essential particular" (*Knight v. Coudersport Borough*, 246 Pa. 284, 288, 92 A. 299) and the specimen ballots in the wards involved in this appeal were not "like the official ballots". On the specimen ballot, the levers are shown in the ballot labels wherein appeared the candidates' names; on the machine the levers were outside the ballot labels. On the specimen ballot, in the Democratic column and *below* the word "Democratic", was the letter "B" followed by a pointing hand which did not point to any row of levers; on the voting machines, the letter "B" is *above* the word "Democratic" and the pointing hand points to the levers in panel "B". A comparison of the specimen ballot and the face of the voting machine readily indicates the non-conformity of the former with the latter.

The majority takes refuge in the statement that the machines were "clear to every one". The weakness of this statement is well-illustrated by an incident which took place in the hearing in the court below when the very intelligent counsel for the Board, requested by the court to point out the levers in panel "C", depressed the levers in panel "D". This incident emphasizes, if any emphasis be needed, the complexity and intricacy of the voting machines which confused these voters.

The power to throw out ballots should be exercised very sparingly and only for "compelling reasons" (*Bauman Election Contest Case*, 351 Pa. 451, 454, 41 A. 2d 630) and "the rights of voters are not to be prejudiced by the errors or wrongful acts of election officers" (*Wilkes-Barre Election Contest*, 400 Pa. 507, 513, 162 A. 2d 363).

In summary, I am of the opinion that: (1) Section 1216(d)—which establishes the guideline for voting on voting machines at primary elections—does not, *although it should,* proscribe the depression of a lever *below* the name of a candidate; (2) under the language of the carelessly drafted Section 1216(d), at best, it is doubtful that the depression of a lever below the name of a candidate violates Section 1216(d) and any doubt in the construction of the statute must be resolved in favor of the voter; (3) even if the manner of voting in the case at bar be considered a violation of Section 1216(d), the violation was of such nature, that, if the voters' intent can be ascertained, such intent should govern; (4) it is clear beyond question that the voters, depressing the levers in panel "C", *intended* thereby to vote for the candidate whose names were *above* such levers; (5) the suggestion in the majority opinion that the votes recorded in Row C were "protest", "cross-over" or "mistake" votes is based on conjecture and not upon proof of the quality upon which a judicial decree can be predicated; (6) even though the operation of the levers in panel "C" violated Section 1216(d), the intent of the voters being evident, there is no "compelling reason" to justify the invalidation of the votes and disfranchise thousands of well-intentioned voters.[28]

Lastly, I am reminded that in *Simon Election Case,* 353 Pa. 514, 519, 46 A. 2d 243, we said: "The courts have never been able to lay down a precise standard by which it can be determined in a given case whether the irregularities [on the part of the officials conducting an election and making the electoral count] are of sufficient magnitude to justify the rejection of an entire poll in any district in

28. It is interesting to note the perspective of the appellee, the court below and the majority of this Court which is directed to and concentrated on the fact that the questioned votes were cast in "blank spaces". Such perspective overlooks completely the fact that the thrust of Section 1216(d) is directed to the operation of the levers, not to the place of recordation of the votes. The criterion by which the validity of the votes cast must be determined is *exclusively* that furnished by the statute.

which the question arises. The facts in each case must be considered and a determination reached as to whether justice is more likely to be done by counting the votes, despite the irregularities, or by refusing to count them because of the irregularities." Under the facts as presented on this record, I am convinced that "justice is more likely to be done by counting the votes" than "by refusing to count them".

The right to vote for United States Senator is protected and guaranteed by the Constitution of the United States (Art. I, Sec. 2 and 3; 17th Amendment). The right to vote obviously carries with it the right to have one's vote counted. In *U. S. v. Classic*, 313 U. S. 299, 314-16, 61 S. Ct. 1031, 85 L. Ed. 1368, the U. S. Supreme Court has recognized as a right "secured by the Constitution" the right of voters *"to cast their ballots and have them counted"*. As a result of the majority view thousands of voters have been denied this constitutional right. The Supreme Court of the United States in *Gray v. Sanders*, 372 U. S. 368, 380, — L. Ed. —, declared: "The right to have one's vote counted has the same dignity as the right to put a ballot in a box." See also: *Wesberry v. Sanders*, 376 U. S. 1, 11 L. Ed. 2d 481, 486. A study of the majority opinion does not reveal any sound, let alone *compelling*, reason for the denial of this right.

The record in this case and our applicable law, statutory and decisional, compel me to recognize the intent of the voters. I cannot in good conscience on the facts of this case be a party to the disfranchisement and denial of the constitutional right of these thousands of voters. In my opinion, these votes should be validated; right and justice command that result. I would reverse the order of the court below.

Mr. Justice O'Brien joins in this Dissenting Opinion.

SUPREME COURT OF PENNSYLVANIA
Eastern District

Patrick N. Bolsinger
Prothonotary

George W Dunn Jr
Deputy Prothonotary

Philadelphia 19107

August 7, 1964.

Abraham E. Freedman, Esq.,
1415 Walnut St.,
Philadelphia, Pa., 19102.

In re: Petition of Democratic County Committee of Philadelphia on behalf of all its Endorsed Candidates for Nomination at the April 28, 1964 Primary Election, etc.—Appeal of Democratic County Committee of Philadelphia, etc.

No. 329 January Term. 1964

Dear Mr. Freedman:

The following Order has been entered on the Amended Petition for Reconsideration and/or Reargument, filed in the above entitled proceeding:

"August 7, 1964

Per Curiam.

Petition denied. Further proceedings to stay for ten days."

Very truly yours,

GEORGE W. DUNN, JR.
Deputy Pronothary

GWDJr:RWH

cc: Philip Kalodner, Esq., 306 S. 19th St., Philadelphia, Pa.

Edward E. Russell, Esq., 1302 Land Title Bldg., Philadelphia, Pa., 19110

Tyson W. Coughlin, Esq., 1035 Land Title Bldg., Philadelphia, Pa., 19110

Levy Anderson, Esq., First Deputy City Solicitor, 702 City Hall Annex, Philadelphia, Pa., 19107

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN RE: Petition of Democratic County Committee of Philadelphia on behalf of all its Endorsed Candidates for N nination at the April 28, 1964 Primary Election in Wards 23, 25, 33, 35, 36, 41, 45, 53, 54, 55, 56, 57 and 58. Appeal of DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA	No. 329 January Term, 1964 Appeal From Order of Court of Common Pleas No. 2 of Philadelphia County, March Term, 1964, No. 5446.

ORDER.

Filed: August 11, 1964

After careful consideration by all of the members of this Court sitting on this appeal of both the original and the amended petitions of the Democratic County Committee for a reconsideration of our Order of July 27, 1964 and/or a reargument of this appeal, and after a careful consideration of all the exceptions filed to the Order of August 7, 1964, as well as all other matters brought to our attention since our Order of July 27, 1964, this Court, although divided upon the merits of the appeal, is unanimous in its opinion that no useful purpose can be served by either a reconsideration of our Order of July 27, 1964, or a reargument of the merits of this appeal.

Therefore, this 11th day of August, 1964, the petitions, both original and amended, for a reconsideration of our Order of July 27, 1964, and/or a reargument of this appeal are denied and the exceptions to the Order of August 7,

1964 are dismissed. That portion of the Order of August 7, 1964, staying proceedings for a 10-day period from that date shall remain in full force and effect.

By THE COURT,

JOHN C. BELL, JR., Chief Justice
BENJAMIN R. JONES, Justice
MICHAEL J. EAGEN, Justice
HENRY X. O'BRIEN, Justice
SAMUEL J. ROBERTS, Justice

EXCERPTS FROM UNITED STATES CONSTITUTION.

Article 1.

Section 2, Clause 1. House of Representatives; composition and election of members.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article 1.

Section 3, Clause 1. Senate; composition; election of Senators.

[The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.]

Article 1.

Section 4, Clause 1. Congressional elections; time, place, and manner of holding.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Amendment XVII.—Popular Election of Senators.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

EXCERPTS FROM ELECTION CODE.

Act of June 3, 1937, P. L. 1333.

Art. XII § 1216.

(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed. At elections, he may vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the names of candidates of his choice are placed,

Art. XI § 1111.

(c) On or before the fortieth day preceding an election, the county election board shall mail to the chairman of the county committee of each political party, which shall be entitled under existing laws to participate in primary elections within the county, and to the chairman or presiding officer of any organization of citizens within the county having as its purpose or among its purposes the investigation or prosecution of election frauds, which has registered its name and address, and the names of its principal officers with the county election board at least fifty (50) days before such election, a written notice stating the times when and the place or places where preparation of the machines for use in the several election districts in the county will be started. One representative of each of such political parties, certified by the respective chairmen of the county committees of such parties, and one representative of each such organization of citizens, certified by the respective chairmen or presiding officers of such organizations, shall be entitled to be present, during the preparation of the machines, and to see that the machines are properly prepared and are placed in proper condition and order for use: * * *

§ 3007. Requirements of voting machines.

Art. XI § 1107.

No voting machine shall, upon any examination or re-examination, be approved by the Secretary of the Commonwealth, or by any examiner appointed by him, unless it shall, at the time, satisfy the following requirements:

* * *

(e) It shall preclude each voter from voting for any candidate, or upon any question, for whom or upon which he is not entitled to vote, and from voting for more persons for any office than he is entitled to vote for, and from voting for any candidate for the same office or upon any question more than once, except in districts and for offices where cumulative voting is authorized by law.

(f) It shall be capable of adjustment by election officers, so as to permit each voter at a primary election to vote only for the candidates for nonpartisan nomination, if any, and for the candidates seeking nomination by the political party in which he is registered and enrolled, if he is enrolled as a member of a political party, and so as to preclude him from voting for the candidates seeking nomination by any political party in which he is not enrolled.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 391

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA,
on Behalf of MICHAEL A. MUSMANNO,
Petitioner,

v.

COUNTY BOARD OF ELECTIONS OF
PHILADELPHIA COUNTY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEVY ANDERSON
First Deputy City Solicitor
EDWARD G. BAUER, JR.
City Solicitor
Attorneys for the Respondent

703 City Hall Annex
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

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IN THE

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No. 391

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA,
on Behalf of MICHAEL A. MUSMANNO,
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COUNTY BOARD OF ELECTIONS OF
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OPINIONS BELOW

The Opinion of Court of Common Pleas No. 2 of Philadelphia County (pages 2a-9a of the Appendix to Petition) is unreported. The majority, concurring and dissenting opinions of the Supreme Court of Pennsylvania (pages 11a-51a of the Appendix to Petition) are unreported.

JURISDICTION

It is denied that the jurisdictional requirement has been met for the reason that neither at oral argument or in the briefs before Court of Common Pleas No. 2 of Philadelphia County or the Supreme Court of Pennsylvania did the petitioner raise or argue the question concerning the denial of any rights under the Constitution of the United States. This question was raised for the first time upon the peti-

tion and amended petition for reconsideration and/or re-argument filed by the petitioners in the Supreme Court of Pennsylvania, and that Court denied those petitions without opinion or passing upon the constitutional arguments. Further the petitioner has no standing to make complaint because neither it nor the candidate on whose behalf the petition is filed has been deprived of any constitutional right nor any right under any federal statute and no voter allegedly affected is a party to this action.

QUESTION PRESENTED

Where voting machines are used in a primary election in a state where cross-over voting is not permitted and where the candidates for nomination for each political party are listed in horizontal rows, with the first row labelled "REPUBLICAN," the second row labelled "DEMOCRATIC," the third row labelled "Special Election REPUBLICAN" (listing Republican candidates in a special election) and the fourth row labelled "Special Election DEMOCRATIC" (listing Democratic candidates in the special election), and the proper method of voting is by turning down the voting levers above the names of the respective candidates, may "votes" cast by turning down levers in the "Special Election REPUBLICAN" row over spaces where no candidates were listed be added to the vote for the Democratic candidates whose names appear in the Democratic row, where voters registered Republican and Non-Partisan could have and Republican voters did turn down the levers over the "Special Election REPUBLICAN" row? [1]

STATEMENT

This case arises out of the primary election held in the City of Philadelphia, Pennsylvania, on April 28, 1964 in

[1] The statutory provisions of the Pennsylvania Election Code relating to the use of voting machines are attached hereto and marked Exhibit "A".

which Jamestown voting machines were used. These machines carried the designation of the offices to be voted for in horizontal rows at the top of the machines and the candidates for each party were listed in adjoining horizontal rows immediately below with the name of each party at the far left.

The rows containing the candidates were arranged as follows;

ROW "A"—"REPUBLICAN" (listed the candidates for Republican primary nomination)

ROW "B"—"DEMOCRATIC" (listed the candidates for Democratic primary nomination)

In 13 Wards of the City these Jamestown voting machines were also used for special elections to fill vacancies in the offices of Representative in Congress and for Representative in the General Assembly in Pennsylvania. In those Wards the next two rows on the machine were set up as follows:

ROW "C"—"Special Election

REPUBLICAN" (No candidates' names were listed on this row except at the extreme right, where the names of the Republican candidates in the special elections appeared).

ROW "D"—"Special Election

DEMOCRATIC" (No candidates' names were listed on this row except at the extreme right, where the names of the Democratic candidates in the special elections appeared).

There were heavy black lines between the party labels in each row at the extreme left of the machine. Those lines included the voting levers at the top of each row and the names of the candidates below. Each party label carried a finger pointing to the levers at the top of each row as being the proper lever to pull in order to vote for a candidate in that row. In Rows "C" and "D" there were blank white cards over the spaces where the names of party candidates for nomination would ordinarily appear. Long black arrows were imprinted on these white cards, pointing to the candidates in the special election at the extreme right. The photograph appearing at page 22a of the Appendix to the petition correctly sets forth the appearance of the machine.

When a lever over the name of a candidate was turned down the end of the lever appeared directly upon the name of the candidate being voted for. When the lever at the top of Row "C" was turned down, the end of the lever was directly over the blank card in Row "C" except when voting for the candidates in the special election. The sample ballot posted outside each polling place indicated that the proper lever to be used in voting for a particular candidate was the one above the name of the candidate. The instructions contained on that sample ballot included the following:

"INSTRUCTIONS TO VOTER

"1st. Move the Red Handle of the Curtain Lever to the Right as far as it will go and leave it there (This will close the curtain around you and unlock the machine for voting)

"2nd. *Turn down a pointer over the name of each candidate* in your own party row* that you wish to vote for, from this position ▬▬ to this position ╲ and leave it there.

"(You will note on the Ballot that the "*Republican Party occupies the first horizontal row, the Democratic Party the second horizontal row. When voting your Party Row*, start at the left under the office of President of the United States and *turn down as many pointers as there are candidates to be elected for each office.* Do not be afraid of making a mistake or spoiling your ballot, as the machine will guard you against all such errors. *Just remember to turn down a pointer over the name of each candidate you wish to vote for*—the machine will do the rest. AT A GENERAL PRIMARY ELECTION YOU ARE PERMITTED TO VOTE ONLY FOR THE CANDIDATES IN YOUR OWN PARTY; THEREFORE, DO NOT ATTEMPT TO VOTE FOR CANDIDATES IN ANY OTHER PARTY, BECAUSE THE VOTING POINTERS ARE LOCKED AGAINST OPERATION.) (Exception—in case of any SPECIAL ELECTION, you may vote for any candidate of either Party.)

"3rd. After arranging your ticket, leave the pointers as they are, that is, turned down in a voting position; move the "Red Handle" to the left, as far as it will go and leave it there. This will automatically register a vote for each of the candidates for whom you voted, and at the same time will turn back the voting pointers and open the curtain.

REMEMBER

"That no votes are registered until the "Red Handle" is moved to the left to open the curtain. Therefore, as long as the curtain is closed around you, you can change your vote as many times as you desire by simply turning back the pointer *over the*

name of the candidate for whom you do not wish to vote, and *turning down the pointer over the name of the candidate* for whom you wish to vote. The machine will not allow you to vote for more than the proper number of candidates."

(emphasis supplied)
(*underscored in original)

The machines were adjustable by the election officials so electors who were registered Republican could vote in Row "A" (REPUBLICAN) but could not vote in Row "B" (DEMOCRATIC). Electors registered Democratic could vote in Row "B" but could not vote in Row "A". Voters registered Non-Partisan could not vote in Row "A" or "B" but were permitted to vote for candidates in the special election in Row "C" (Special Election REPUBLICAN) or in Row "D" (Special Election DEMOCRATIC) and were also permitted to vote on a referendum question appearing in the upper left portion of the machine above the names of the candidates in the primary election. On these voting machines part of a horizontal row could not be locked out. Hence electors registered Republican, Democratic and Non-Partisan who had not voted in Rows "A" or "B" could turn down the voting levers in all the columns of Rows "C" and "D" including the levers over the names of the candidates in the special election. The only way the voting levers in Row "C" and Row "D" could be rendered inoperative was by placing specially designed cover plates over the voting levers in those two rows. These plates could be secured only from the manufacturer of the machines.

Approximately 10 days before the primary election in question the petitioner requested that the County Board of Elections render the excess voting levers in Row "C" and Row "D" inoperative. Delivery of the machines to the polling places required at least three days. This left only about a week to secure the necessary cover plates. The County Board of Elections immediately contacted the manufacturer

of the machines who advised that they could not supply these cover plates in time.

Section 1216(c) of the Pennsylvania Election Code (25 Purdon's Statutes §3056(d)) provides as follows with respect to the manner of voting in primary elections in districts in which voting machines are used:

> "(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed. . . ."

Cross-over voting is not permitted in primary elections in Pennsylvania.

These voting machines have been used in the City of Philadelphia since 1930 and no difficulty had previously been encountered during the entire period although many special elections were held in the same manner.

After the canvass of the voting machines by the County Board of Elections the petitioner requested that the County Board of Elections count the "votes" in Row "C" and add the total of these votes to the respective candidates in Row "B". This the County Board of Elections, consisting of two Democrats and one Republican, refused to do. The petitioner then appealed to Court of Common Pleas of Philadelphia County which ordered the "vote" in Row "C" to be tabulated and a report thereon made to the court. (Exhibit "A", page 29 of Petition).

That count showed the following "votes" cast in Row "C" for the three Democratic senatorial candidates:

Blatt	2094
Roberts	181
Musmanno	3349
Total	5624

A substantial number of "votes" were also cast in Row "C" in columns in which there were no candidates in Row

"B" and in columns in which there were no candidates in either Row "A" or Row "B". Votes were cast in Row "C" in columns where the only candidates were in Row "A"—for "Delegates to Republican National Convention." A total of 41,499 votes were cast for the two Republican candidates in Row "A" and 67,534 votes were cast for the Democratic candidates in Row "B" respectively, for nomination to the office of United States Senator—a total of 109,033.

In the tabulation it was found that in some voting precincts one machine recorded votes in Row "A" but no votes in Row "B"; while the other voting machine in the same precinct recorded votes in Row "B" but none in Row "A". This was by reason of the fact that the first machine was used only for Republican electors, while the second machine was used only for Democratic electors. Nevertheless, both machines showed "votes" recorded in Row "C".

The Court of Common Pleas, in affirming the action of the County Board of Elections in refusing to count the "votes" in Row "C", declared that the voter must comply with the regulations for voting in order to have his vote counted. That court decided that since Republican, Democratic and Non-Partisans could and probably did vote in Row "C" and because it was not possible to determine who voted in Row "C", or the intent of the voter who voted in Row "C", those "votes" could not be counted.

The Supreme Court of Pennsylvania, in sustaining the County Board of Elections and the court below, relied upon the following facts:

a) Row "C" was marked "Special Election REPUBLICAN" with an arrow pointing to a Republican candidate in the special election,

b) Under Article 12(d) §1216 of the Election Code of Philadelphia, Act of June 3, 1937, P. L. 1333, 25 Purdon's Statutes §3056 providing as follows:

> "(d) At primaries, he shall vote for each candidate individually by operating the

> key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed."

the correct method of voting was by turning down the lever over a candidate's name.

c) If the voter were in any doubt he could have secured instructions in the proper method of voting.

d) The sample ballot informed the voter in clear language, together with a diagram, that in order to vote "turn down a pointer over the name of each candidate in your own party row."

e) That it would be a pure guess to determine whether the "votes" recorded in the blank spaces in Republican Row C represented, (1) protest votes, or (2) nonpartisan votes, or (3) Republican votes, or (4) Democratic votes, (5) or votes for Rovner [A Republican candidate in the Special Election], or (6) 'mistake' votes; but in any event they were illegally cast and were clearly and undoubtedly void votes!

The State Supreme Court ruled that under the Election Code of Pennsylvania and the instructions for the use of the Jamestown voting machines the only proper method for voting was to turn down the levers over the names of the candidates and that levers turned down anywhere else could not be counted.

That court stated that "Furthermore, appellant has not been deprived of any right ordained by the Constitution of the United States." [2] On August 20, 1964 the County Board of Elections certified the result of the election to the

[2] Appendix to Petition, 21a, erroneously quoted by the Petitioner at the bottom of page 8 of the Petition as "did not deprive these voters of any right ordered or guaranteed by the Constitution of the United States."

Pennsylvania Election Bureau, which on August 21, 1964 certified Genevieve Blatt as having been elected as the Democratic nominee for United States Senator from the Commonwealth of Pennsylvania.

ARGUMENT

Introduction

There is nothing in the present case warranting review by this Court on certiorari. All of the proceedings before the County Board of Elections, the Court of Common Pleas and the Supreme Court of Pennsylvania concerned issues arising under the Pennsylvania Election Code and whether or not the votes recorded in the Special Election REPUBLICAN Row "C" of the voting machine could, under state law, be properly counted.

The case does not involve any denial of the franchise to any prospective voter nor does it involve any fraud on the part of the County Board of Elections. At most it involves the failure of the County Board of Elections to anticipate that any voter would fail to follow the clear directions and instructions for voting in the light of the fact that such a problem had not arisen in over 30 years of experience with these voting machines. The petitioner complains about alleged "disfranchisement" of voters but no voter alleged to have been disfranchised is a party to this proceeding nor has any such voter attempted to intervene herein. Indeed no candidate is a party to this proceeding—only a committee of a political party. The petitioner did not raise the so-called constitutional issue before the County Board of Elections, before the Court of Common Pleas, or before the Pennsylvania Supreme Court until he filed his petition and amended petition for reconsideration and/or reargument; and there is no merit to that contention.

I. The Constitutional Issue Is Raised Too Late.

The petitioner by failing to raise the question until the filing of the petition for reconsideration and/or reargument is debarred from having the matter considered by this court. The general rule is that a constitutional question is urged too late if brought forth for the first time upon a petition for rehearing. *Great Northern Railway v. Sunburst Oil & Refining Company*, 287 U. S. 358, 53 S. Ct. 145, 77 L.ed. 360, 85 ALR 254 (1932); *Bloeth v. State of New York*, 368 U. S. 868, 82 S. Ct. 661, 7 L.ed. 2d 780 (1962). Of course, where the court below actually entertains such a petition and expressly decides the question then the jurisdiction of this court attaches. *Radio Station W O W v. Johnson*, 326 U. S. 120, 128, 65 S. Ct. 1475, 89 L.ed. 2092 (1945).

In the original opinion of the Supreme Court of Pennsylvania based upon the briefs and oral argument, in none of which was the constitutional argument presented, the statement appears at the end of the opinion "Furthermore, appellant has not been deprived of any right, ordained or guaranteed by the Constitution of the United States." (Appendix to Petition page 21a)

The opinion of the Supreme Court of Pennsylvania deals entirely with state law and does not purport to interpret any federal statute or provision of the Constitution of the United States. Indeed it does not even cite any decision of this court or any other federal court. The concurring opinion refers to the case of *Gray v. Sanders*, 372 U. S. 368, 83 S. Ct. 801, 9 L.ed. 2d 821 (1963), as not being authority for the proposition that votes invalidly cast must counted; and then points out that no claim was made that any voter was denied the right to vote and that no constitutional question was raised or argued in the appeal.

The Supreme Court of Pennsylvania dismissed both the original and the amended petition for reconsideration and/or reargument without any comment concerning the constitutional issues therein raised for the first time. (Appendix to Petition 52a-55a).

II. The Petitioner Has Not Been Deprived of Any Constitutional Right.

The petition complains of alleged disfranchisement of voters. However, no voter is a party to this action. In fact, no candidate is a party to this action. This action was brought by a political party committee. No provision of the Federal Constitution and no federal statute secures the right of a candidate to be nominated for the office of United States Senator. *United States v. Gradwell*, 243 U. S. 476, 488, 37 S. Ct. 407, 61 L.ed. 857 (1917). Also see *Johnson v. Stevenson*, (CA 7), 170 F. 2d 108, 111 (1948).

If a candidate for nomination has no right secured by federal law or the Constitution of the United States, a fortiori, neither has the committee of a political party. The right of a candidate to nomination, as clearly pointed out in *United States v. Gradwell, supra*, is under state law. That right under the law of the Commonwealth of Pennsylvania has been adjudicated by the Supreme Court of Pennsylvania adversely to Petitioner.

III. Elections to Nominate Candidates for United States Senator Are Governed by State Law.

Essentially, this matter is an election contest over which federal courts have no jurisdiction. See 28 U.S.C.A. §1344, which gives Federal district courts jurisdiction over election contests only if the sole question "arises out of the denial of the right to vote on account of race, color or previous condition of servitude" and limits that jurisdiction to the determination of the "rights of parties to office by reason of the denial of the right to vote". That section, however, excludes disputes involving the office of United States Senator. *Johnson v. Stevenson*, (CA 7) 170 F. 2d 108 (1948). Election contests involving the nomination for the office of United States Senator are specifically provided for under §1711 of the Pennsylvania Election Code of 1937, (25 Purdon's Statutes §3291); and §1731 of the Pennsylvania

Election Code (25 Purdon's Statutes, §3351), sets forth the procedure.

Under Article 1, §4, Clause 1 of the Constitution of the United States, it is provided that:

> *"The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof;* but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." (Emphasis supplied)

Hence, barring fraud or discrimination (whether by reason of color or by reason of improper apportionment) whether a so-called vote may be counted is a matter for determination under state law—at least where the Congress has not legislated thereon. *Newberry v. United States*, 256 U. S. 232, 41 S. Ct. 469, 65 L.ed. 913 (1921). The Petition has not pointed out any federal statute governing the issue involved in this case. Cases such as the right to vote without discrimination [*Smith v. Allwright*, 321 U. S. 649, 64 S. Ct. 757, 88 L.ed. 87 (1943)]; the weight to be given to a vote as in apportionment cases [*Westberry v. Sanders*, 376 U. S. 1, 84 S. Ct. 526, 11 L.ed. 2d 481 (1964)] and fraud in the count and certification of ballots [*United States v. Classic*, 313 U. S. 299, 62 S. Ct. 51, 85 L.ed. 1368 (1941)] are inapposite.

IV. Under Pennsylvania Law a Voter Who Has Cast His Vote in the Wrong Space Has Cast an Invalid Vote.

The only question is whether or not under the law of Pennsylvania the "votes" improperly cast in the Special Election REPUBLICAN Row "C" can properly be added to the votes properly cast for the candidates in DEMOCRATIC Row "B". The Supreme Court of Pennsylvania in considering that matter has decided that they could not be so counted—based on three major premises: (a) the

voters had voted improperly by turning down the lever in Special Election REPUBLICAN Row "C" over blank spaces, (b) their intention in doing so could not be determined, and (c) in any event those so-called "votes" were tainted because Republican and Non-Partisan electors could have and Republican electors did vote in that row.

In Pennsylvania cross-over voting is prohibited in primary elections under §1216(c) of the Pennsylvania Election Code of 1937 (25 Purdon's Statutes, §3056) providing as follows:

> "(c) At primaries, before a voter is admitted to the voting machine, it shall be adjusted by the election officer in charge thereof, so that such voter will only be able to vote for the candidates of the party in which he is registered and enrolled and for candidates for nonpartisan nomination, if any."

The voting machines in question were properly set up and operated to carry out the mandate of the statute. The instructions for the use of the machines contained in the sample ballots posted outside the polling places and the placement and design of the party labels on the machines carried out the directive of the statute. If the voter invalidated his ballot by ignoring the provisions of the statute and the instructions and directions for voting he has no one but himself to blame. As the opinion of the Supreme Court of Pennsylvania clearly points out, it was impossible to determine the intention of those who voted in Row "C", and it was also clear that many ineligible voters registered Republican had improperly voted in that row. Also see *Matter of Lester v. Gruner*, 205 (N. Y.) Misc. 67, 127 N.Y.S. 2d 272 (1953); *Leffel v. Brown*, 80 Abs. 273, 159 N.E. 2d 807 (Court of Common Pleas of Ohio, 1959).

The opinion of the Supreme Court of Pennsylvania interpreting the Pennsylvania Election Code is binding on this court. *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415, 432, 83 S. Ct. 328,

9 L.ed. 2d 405, 417 (1963). The contention of the petitioner that this is contrary to prior decisions of the Supreme Court of Pennsylvania, which is not conceded, is nothing more than a request to this court to act as a super-Supreme Court of Pennsylvania in reviewing the extent to which that court should be bound by prior decisions in other cases.

The position apparently taken by the petitioner is that under the principle of "one person, one vote" every vote must be counted no matter how it violates the state law or the regulations covering voting and regardless of how difficult or impossible it is to determine the intention of the voter who has failed to cast his vote properly. Of necessity there must be circumstances under which a vote cannot be counted. For instance, if the voter fails to appear at the proper place at the proper time or fails to cast the ballot officially provided and properly marked, that vote is void. Similarly if in some other substantial manner a voter fails to comply with the statutory requirements or regulations for voting, that vote is void. The issue is not one of disfranchising any voter. Voters' loss of their votes because of their failure to vote in a lawful manner is not a matter of recent development. Such losses will undoubtedly continue so long as the right to vote exists.

The true issue is whether votes may be counted where (1) the electors failed to follow the statutory provisions and the instructions and directions for voting; (2) where it is impossible to determine the true intent of the electors; and (3) where the so-called votes are tainted because a very substantial portion were cast by persons who had no right to vote for Democratic candidates because they were registered in another political party. Rejecting votes cast under these circumstances does not and cannot violate any constitutional provision dealing with elections. The overwhelming majority of electors who have voted properly also have a right not to have their votes diluted by "votes" improperly cast. *Gray v. Sanders, supra*, 372 U. S. at page 380,

9 L.ed. 2d at page 830. There is nothing in the decision of the Supreme Court of Pennsylvania in interpreting the Pennsylvania Election Code that is contrary to any provision of the United States Constitution cited by the petitioner or otherwise.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LEVY ANDERSON
First Deputy City Solicitor
EDWARD G. BAUER, JR.
City Solicitor
Counsel for Respondent

August , 1964

APPENDIX "A"

The statutory provisions of the Election Code relating to this case are the Act of June 3, 1937, P. L. 1333, Sec. 1107, 1111, 1216, 1711 (in part) and 1731, 25 Purdon's Statutes, Sec. 3007, 3011, 3056, 3291 (in part) and 3351. These provisions are as follows:

§ 1107

No voting machine shall, upon any examination or re-examination, be approved by the Secretary of the Commonwealth, or by any examiner appointed by him, unless it shall, at the time, satisfy the following requirements:

(a) It shall provide facilities for voting for such candidates as may be nominated, and upon such questions as may be submitted.

(b) It shall permit each voter, at other than primary elections, to vote a straight political party ticket in one operation, and, in one operation, to vote for all the candidates of one political party for presidential electors, and, in one operation, to vote for all the candidates of one political party for every office to be voted for, except those offices as to which he votes for individual candidates.

(c) It shall permit each voter, at other than primary elections, to vote a ticket selected from the nominees of any and all political parties, from the nominees of any and all political bodies, and from persons not in nomination.

(d) It shall permit each voter to vote, at any election, for any person and for any office for whom and for which he is lawfully entitled to vote, whether or not the name of such person appears upon a ballot label as a candidate for nomination or election, and to vote for as many persons for an office as he is entitled to vote for, and to vote for or against any question upon which he is entitled to vote.

(e) It shall preclude each voter from voting for any candidate, or upon any question, for whom or upon which he is not entitled to vote, and from voting for more persons for any office than he is entitled to vote for, and from voting for any candidate for the same office or upon any question more than once, except in districts and for offices where cumulative voting is authorized by law.

(f) It shall be capable of adjustment by election officers, so as to permit each voter at a primary election to vote only for the candidates for nonpartisan nomination, if any, and for the candidates seeking nomination by the political party in which he is registered and enrolled, if he is enrolled as a member of a political party, and so as to preclude him from voting for the candidates seeking nomination by any political party in which he is not enrolled.

(g) It shall permit each voter to deposit, write in, or affix upon receptacles or devices provided for the purpose, ballots containing the names of persons for whom he desires to vote, whose names do not appear upon the machine.

(h) It shall permit each voter to change his vote for any candidate, or upon any question appearing upon the ballot labels, up to the time he begins the final operation to register his vote, or indicates or expresses his intention to register his vote.

(i) It shall permit and require voting in absolute secrecy, and shall be so constructed that no person can see or know for whom any other elector has voted or is voting, save a voter whom he has assisted or is assisting in voting, as prescribed by law.

(j) It shall have voting devices for separate candidates and questions, which shall be arranged in separate parallel rows or columns, so that, at any primary election, one or more adjacent rows or columns may be assigned to the candidates of a party, and shall have parallel office columns or rows transverse thereto.

(k) It shall have a counter, or other device, the register of which is visible from the outside of the machine, which shall show during any period of voting the total number of voters who have operated the machine during said period of voting.

(l) It shall have a protective counter, or other device, the register of which cannot be reset, which shall record the cumulative total number of movements of the operating mechanism.

(m) It shall be provided with a lock or locks, by the use of which, immediately after the polls are closed, or the operation of the machine for an election is completed, all movement of the registering mechanism is absolutely prevented.

(n) It shall be provided with a screen, hood or curtain, which shall conceal the actions of the voter while voting.

(o) It shall be constructed of material of good quality, in a neat and workmanlike manner.

(p) It shall, when properly operated, register or record correctly and accurately every vote cast.

(q) It shall be so constructed that a voter may readily learn the method of operating it.

(r) It shall be safely transportable.

(s) It shall be so constructed and controlled that, during the progress of voting, it shall preclude every person from seeing or knowing the number of votes registered for any candidate, and from tampering with any of the registering mechanism.

(t) If it is of a type equipped with mechanism for printing paper proof sheets, and not requiring the counters to be made visible in order to canvass the votes recorded on the machine, the door, or other device, concealing such counters, or keeping the same concealed, may be equipped

with a lock or locks, requiring the simultaneous use of three separate and substantially different keys to open or operate the same.

§ 1111

(a) The county election board of each county shall cause the proper ballot labels to be placed on each voting machine which is to be used in any election district within such county; and shall cause each machine to be placed in proper order for voting; shall examine each machine before it is sent out to a polling place; shall see that each registering counter, except the protective counter, on each machine is set at zero (000); shall lock each machine so that the counting machinery cannot be operated, and shall seal each machine with a numbered seal. The county election board or their duly authorized agent shall adjust each machine to be used at a primary election, so that the election officers may lock it on primary election day, in such a way that each voter can vote only for the candidates for nonpartisan nomination, if any, and for the candidates seeking nomination by the political party in which he is enrolled, if he is enrolled as a member of a political party, and so that no voter can vote for the candidates seeking nomination by any political party in which he is not enrolled.

(b) The county election board shall appoint one custodian of voting machines, and such deputy custodians as may be necessary, whose duty it shall be to prepare the machines to be used in the county at the elections to be held therein. Each custodian and deputy custodian shall receive from the county, for each day he is actually employed under the provisions of this act, such compensation as shall be fixed by the county election board, but not less than five dollars ($5.00) per day. Such custodian shall, under the direction of the county election board, have charge of and represent the county election board during the preparation of the voting machines as required by this act, and he and

the deputy custodians, whose duty it shall be to assist him in the discharge of his duties, shall serve at the pleasure of the county election board. Each custodian shall take the constitutional oath of office, which shall be filed with the county election board.

(c) On or before the fortieth day preceding an election, the county election board shall mail to the chairman of the county committee of each political party, which shall be entitled under existing laws to participate in primary elections within the county, and to the chairman or presiding officer of any organization of citizens within the county having as its purpose or among its purposes the investigation or prosecution of election frauds, which has registered its name and address, and the names of its principal officers with the county election board at least fifty (50) days before such election, a written notice stating the times when and the place or places where preparation of the machines for use in the several election districts in the county will be started. One representative of each of such political parties, certified by the respective chairmen of the county committees of such parties, and one representative of each such organization of citizens, certified by the respective chairmen or presiding officers of such organizations, shall be entitled to be present, during the preparation of the machines, and to see that the machines are properly prepared and are placed in proper condition and order for use: Provided, however, That such repesentatives shall not interfere with preparation of the machines, and the county board may make such reasonable rules and regulations governing the conduct of such representatives.

(d) The custodian and deputy custodians of voting machines shall make a certificate, in writing, which each shall sign, and request each representative of a party or a citizens organization as aforesaid, present at the preparation of the machine to attest, and which shall be filed with the county election board, stating — (1) the identifying

number or other designation of the voting machine; (2) that each registering counter of the machine was set at zero (000); (3) the number registered on the protective counter or other device of the machine; and (4) the number on the seal with which the machine is sealed.

(e) No member of the county election board, nor custodian, nor other employee of the county election board, shall, in any way, prevent free access to and examination of all voting machines, which are to be used at the election, by any of the duly appointed representatives aforesaid; and the county election board and their employes shall afford to each such representative every facility for the examination of all registering counters, protective counters, and public counters of each and every voting machine.

(f) The county election board shall furnish, at the expense of the county, all ballot labels, forms of certificates, returns, and other papers and supplies, required under the provisions of this act, all of which shall be in the form, and according to the specifications, prescribed, from time to time, by the Secretary of the Commonwealth.

§1216

(a) In districts in which voting machines are used, the election officers shall, with the aid of the diagrams authorized by this act and the mechanically operated model, instruct each elector before he enters the voting machine booth regarding the operation of the machine, and shall give the elector opportunity personally to operate the model.

(b) If any voter, after entering the voting machine booth and before the closing of such booth, shall ask for further instructions concerning the manner of voting, any one of the election officers may give him such instructions, but no person giving a voter such instructions shall in any manner request, suggest or seek to persuade or induce any such elector to vote any particular ticket or for any partic-

ular candidate or for or against any particular question. After giving such instructions, and before the elector closes the booth or votes, the election officer shall retire, and the elector shall forthwith vote.

(c) At primaries, before a voter is admitted to the voting machine, it shall be adjusted by the election officer in charge thereof, so that such voter will only be able to vote for the candidates of the party in which he is registered and enrolled and for candidates for nonpartisan nomination, if any.

(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed. At elections, he may vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the names of candidates of his choice are placed, or he may vote a straight political party ticket in one operation by operating the straight political party lever of the political party or political body of his choice, if such machine has thereon a separate lever for all the candidates of the political body. He may also, after having operated the straight party lever, and before recording his vote, cancel the vote for any candidate of such political party or political body by replacing the individual key, handle, pointer or knob of such candidate, and may thereupon vote for a candidate of another party, or political body for the same office by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate appears. In the case of a question submitted to the vote of the electors, the elector shall operate the key, handle, pointer or knob corresponding to the answer which he desires to give.

(e) A voter may, at any primary or election, vote for any person for any office, for which office his name does not appear upon the voting machine as a candidate, by an irregular ballot containing the name of such person deposited,

written or affixed in or upon the appropriate receptacle or device provided in or on the machine for that purpose, and in no other manner. Where two or more persons are to be elected to the same office, and the name of each candidate is placed upon or adjacent to a separate key, handle, pointer or knob, and the voting machine requires that all irregular ballots voted for that office be deposited, written or affixed in or upon a single receptacle or device, an elector may vote in or by such receptacle or device for one or more persons whose names do not appear upon the machine, with or without the names of one or more persons whose names do so appear. With these exceptions, no irregular ballot shall be cast on a voting machine for any person for any office, whose name appears on the machine as a candidate for that office, and any ballot so cast shall be void and not counted.

(f) At any general election at which presidential electors are to be chosen, each elector shall be permitted to vote by one operation for all the presidential electors of a political party or political body. For each party or body nominating presidential electors, a ballot label shall be provided containing only the words "Presidential Electors," preceded by the names of the party or body and followed by the names of the candidates thereof for the office of President and Vice-President, and the corresponding counter or registering device shall register votes cast for said electors when thus voted for collectively. If any elector desires to vote a ticket for presidential electors made up of the names of persons nominated by different parties or bodies, or partially of names of persons so in nomination and partially of names of persons not in nomination by any party or body, or wholly of names of persons not in nomination by any party or body, he may write or deposit a paper ballot prepared by himself in the receptacle provided in or on the machine for the purpose. The machine shall be so constructed that it will not be possible for any one voter to vote a straight party ticket for presidential electors and at the same time to deposit a ballot for presidential electors in a receptacle as

hereinabove provided. When the votes for presidential electors are counted, the votes appearing upon the counter or registering device corresponding to the ballot label containing the names of the candidates for President and Vice-President of any party or body shall be counted as votes for each of the candidates for presidential elector of such party or body, and thereupon all candidates for presidential elector shall be credited, in addition, with the votes cast for them upon the ballots deposited in the machine, as hereinabove provided.

(g) As soon as the elector has adjusted the voting machine so that it will record his choice for the various candidates to be voted for, and his answers to the various questions submitted, he shall operate the recording mechanism, and forthwith leave the voting machine booth.

§1711

The several classes of nominations at primaries and elections of public officers which may be contested in this Commonwealth are hereby distinguished and designated as follows, to wit:

* * * * *

Class II. Nominations and elections of electors of President and Vice-President of the United States and all offices of this Commonwealth, including Judges of the Supreme and Superior Courts (except Governor and Lieutenant Governor), who now are or hereafter shall be required to be nominated or elected by the electors of the State at large, and nominations of United States Senators.

* * * * *

§1731

Cases of the second class shall be tried and determined by the court of common pleas of Dauphin County, upon petition of at least one hundred electors as hereinafter provided.

For the purpose of hearing and determining the complaint in the petition in such cases, the court of common pleas of Dauphin County shall notify to sit with it on the hearing of such complaint, two president judges, learned in the law, residing nearest to the courthouse of the said judicial district, and the judges so notified shall appear and sit as part of the said court on the hearing, trial and determination of such petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964 No. 391

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA, on Behalf of MICHAEL A. MUSMANNO,
Petitioner,

v.

COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT GENEVIEVE BLATT IN OPPOSITION

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1625 K Street, Northwest
Washington, D.C. 20006

PHILIP P. KALODNER,
306 South 19th Street
Philadelphia, Pa. 19103

GREGORY M. HARVEY,
2107 Fidelity-Phila. Trust Bldg.
Philadelphia, Pa. 19109
Counsel for Respondent.

Of Counsel:

ROBERT J. BRAY, JR.
STANHOPE S. BROWNE
THOMAS B. MORRIS, JR.
FERDINAND P. SCHOETTLE, JR.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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CONSTITUTION:

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STATUTE:

Pennsylvania Election Code, Act of June 3, 1937, P. L. 1333, 25 Pa. Stat. Ann. (1963):
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§ 702, 25 Pa. Stat. Ann. § 2812 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964 No. 391

Democratic County Committee of Philadelphia, on Behalf of Michael A. Musmanno,
Petitioner,

v.

County Board of Elections of Philadelphia County,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT GENEVIEVE BLATT IN OPPOSITION

OPINIONS BELOW

All opinions below are unreported and are printed in the appendix to the petition. The opinion of the Court of Common Pleas is printed at Appendix 2a. The opinion of the Supreme Court of Pennsylvania is printed at Appendix 11a. One of the two justices who joined in the opinion of the court filed a concurring opinion, printed at Appendix 23a. A third justice concurred in the result. Two justices dissented and joined in an opinion printed at Appendix 30a.

JURISDICTION

No federal question was raised or argued in this case prior to the order of the Supreme Court of Pennsylvania affirming the judgment of the trial court. The opinion of the Supreme Court of Pennsylvania fails to entertain or dispose of the federal question which petitioner now urges this Court to review. The absence of jurisdiction to review the judgment of the state court under these circumstances is discussed *infra*, at pages 13-15.

The claim (Petition 2-3) that petitioner was denied procedural due process by the manner in which the Supreme Court of Pennsylvania disposed of its two petitions for reargument is frivolous and, in any event, is not mentioned or argued in the body of the petition.

QUESTIONS PRESENTED

In the instant case, the Supreme Court of Pennsylvania applied a well-settled Pennsylvania rule that voting for any candidate in a party primary must be done by moving the appropriate voting-machine lever allocated to that candidate. The rule is necessary to make certain that all votes counted for a particular candidate are cast (a) by persons intending to vote for that candidate and (b) by registered members of the party entitled to vote in the party primary.

1. Does the application of this state rule present a substantial federal question?

2. Can petitioner raise in this Court a federal constitutional issue which it failed to raise below until after the filing of the order of the Supreme Court of Pennsylvania and which that court did not consider?

3. Does petitioner, a political organization purporting to litigate "on behalf of" an individual candidate which it endorsed, have standing to litigate in this Court an alleged denial of constitutional rights of voters whom it does not represent?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies upon Article I, Section 4 and the Seventeenth Amendment to the Constitution of the United States, both set forth in Appendix A to this brief. Petitioner mentions but apparently does not rely upon the due process clause of the Fourteenth Amendment. Petitioner does not mention at any point, and apparently does not rely upon, the equal protection clause of the Fourteenth Amendment.

STATEMENT

Respondent, Genevieve Blatt, is the candidate designated by the Pennsylvania State Board of Elections as the Democratic nominee for the office of United States Senator from Pennsylvania in the general election on November 3, 1964, as a result of the computation of the votes cast in the primary election of April 28, 1964.

Petitioner, the Democratic County Committee of Philadelphia, is the regular party organization which endorsed one of Miss Blatt's opponents, Michael A. Musmanno, a Justice of the Supreme Court of Pennsylvania. It seeks by these proceedings to obtain sufficient additional votes to have Mr. Justice Musmanno designated as the Democratic nominee.

Petitioner asks this Court to hold that numbers appearing in blank spaces on certain voting machines must be counted as if they represented votes properly cast for the Democratic candidates whose names and appropriate voting levers appeared on the voting-machine row above the row of spaces.

The blank spaces involved were in the third horizontal row, designated Row C, of the voting machines used in 13 Wards of the City of Philadelphia. Row C was marked "Special Election REPUBLICAN." Together with Row D,

which was marked "Special Election DEMOCRATIC," Row C was used in special elections to fill unexpired terms of office. Candidates in the Democratic primary election appeared on Row B; candidates in the Republican primary election appeared on Row A. The face of a typical voting machine, showing Rows C and D prepared for a special election for a member of the General Assembly of Pennsylvania, is attached to the opinion of the court below and is reproduced at page 22a of the appendix to the petition.

Both the face of the voting machine itself and the written instructions on the official sample ballot made available to electors at the polling place showed that to vote for a candidate, an elector should "turn down a pointer *over* the name of each candidate *in your party row* . . . ." (Opinion of the Court, p. 13a). The levers in the "Special Election REPUBLICAN" row (Row C) were below and (as is clear from the photograph of the face of the machine) separate from the Democratic primary row (Row B).

Although it is probable that some persons who pulled levers in the blank spaces of the "Special Election REPUBLICAN" row intended to vote for the Democratic candidates whose names appeared in the spaces on Row B above that row, the Supreme Court of Pennsylvania found as facts that:

1. *Some of the persons moving levers in the blank spaces of Row C did not intend to vote for any candidates whose names appeared in Row B.*

Respondent's evidence showed that substantial totals appeared in blank spaces of Row C which were immediately under blank spaces in Row B (the Democratic row) or which were in columns totally blank on all rows of the voting machines (Opinion of the Court, p. 14a, Concurring

Opinion p. 25a). Examples of Row C spaces placed under blank spaces in Row B are 15C, 16C and 17C, shown on the photograph appearing at p. 22a of the appendix to the petition. Totally blank columns on the same photograph are those numbered 39 and 40.

In the 13 Wards, more than 700 alleged votes appeared in the three blank spaces corresponding to 15C, 16C and 17C on the photographed machine; more than 700 alleged votes appeared in the Row C spaces corresponding to the totally blank columns 39 and 40 on the photographed machine. Moreover, substantial numbers of alleged votes appeared in the blank spaces of Row D, immediately below the blank spaces of Row C (Testimony, pp. 6-7, 11-12, 77-78; Answer of Genevieve Blatt, Exhibit B, p. 5). The numbers appearing in such spaces cannot be attributed to an intention to vote for Democratic candidates whose names appeared in the spaces immediately above, since no names whatsoever appeared above. The inescapable inference drawn from this evidence is that a substantial portion of the numbers appearing in each of the blank spaces on Row C, including the three Senatorial columns with which petitioner is most concerned, were also cast as a result of factors other than an intention to vote for candidates whose names appeared on Row B (Opinion of the Court, p. 14a; Concurring Opinion, p. 25a).

2. *A substantial number of those moving levers in the blank spaces of Row C were Republicans and non-partisans.*

All parties agreed that Republican electors, like Democratic electors, were able to move the levers on Row C (Testimony, pp. 15-17; 123-25), provided, of course, that they did not first move a lever in the same group of columns in their respective primary rows. Likewise, a non-partisan elector was able to move levers on Row C. Petitioner is therefore wholly incorrect when it states that "the ma-

jority below speculated without any support in the record that it was possible for a Republican to vote on Row 'C'" (Petition, p. 23).

Under a custom prevailing in some polling places, one voting machine was set aside for the use of Republicans and one for the use of Democrats. Seventeen voting machines were discovered which had obviously been utilized only by Republicans and non-partisans, since they had substantial numbers of votes on Row A (Republican), but no votes at all on Row B (Democratic). These machines were found to contain numbers on Row C, which are part of the numbers which petitioner now desires to count as votes cast in the Democratic primary. The inescapable inference to be drawn from these facts is that substantial numbers of Republicans moved levers on Row C not only on these 17 machines but also on all voting machines used throughout the 13 Wards. The court below so found (Opinion of the Court, p. 15a; Concurring Opinion, p. 25a).

Section 702 of the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, 25 Pa. Stat. Ann. § 2812 (1963), states that "no elector who is not registered and enrolled as a member of a political party . . . shall be permitted to vote the ballot of such party . . . at any primary." The constitutionality of this legislation was upheld in *Krull* v. *Philadelphia*, 382 Pa. 1, 114 A.2d 119 (1955), *affirming on opinion below*, 2 Pa. D. & C. 2d 181 (C.P. Phila. 1955), a case in which the instant petitioner appeared to urge that the statute be sustained.

The Supreme Court of Pennsylvania, after argument at a special session of the court, affirmed the decisions of the trial court and the Board of Elections, both of which had refused to count the blank-space numbers as if they were valid votes. Subsequently, the Pennsylvania court dismissed two petitions for reargument and two sets of exceptions filed to earlier orders of the court (Appendix 54a). The instant petition followed.

ARGUMENT

I. No substantial federal question is presented by the nondiscriminatory application of a state rule that electors may vote for candidates in a party primary election only by using the appropriate voting-machine levers allocated to those candidates. The rule is a valid and necessary exercise of the State's constitutional power under Article I, Section 4 to prescribe the manner of holding elections.

The Supreme Court of Pennsylvania held that both the statutory and decisional law of Pennsylvania require an elector to cast his vote for a particular candidate in a party primary by moving the appropriate voting-machine lever allocated to that candidate, just as an elector voting by paper ballot is required to make his mark in the particular voting space allocated to that candidate.[1]

The Pennsylvania rule is a proper discharge of the state's responsibility pursuant to Article I, Section 4 of the Constitution of the United States to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives. . . ." This Court has recently observed that "the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . ." *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 50, citing *Pope* v. *Williams*, 193 U.S. 621, 633 (upholding registration statute

[1] Section 1216(d) of the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, 25 Pa. Stat. Ann. § 3056(d) (1963), states that the elector shall "vote for each candidate individually by operating *the* key, handle, pointer or knob, upon *or* adjacent to which the name of such candidate is placed." (Emphasis added.) The Pennsylvania court held that this statute requires that only one lever on any one voting machine be used to register votes for a particular candidate. On the "Jamestown" voting machines involved in this litigation, the appropriate lever is the lever immediately *above* the space in which the name of the candidate appears.

The decisional law of Pennsylvania establishes that unless an elector uses the appropriate voting-machine lever or the appropriate voting space on a paper ballot, his action can not be counted as a valid vote. *Contested Election of Flynn*, 181 Pa. 457, 37 Atl. 523 (1897).

requiring declaration of intention one year prior to registration); and *Mason* v. *Missouri*, 179 U.S. 328, 335 (upholding registration statute limited to 3 largest cities in state). As Mr. Justice Douglas commented in the opinion for the unanimous Court, the right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." 360 U.S. at 51. Clearly, a state regulation concerning the manner in which votes are to be registered on voting machines is so basic as to be well within the "broad powers" granted the states "to determine the conditions under which the right of suffrage may be exercised." 360 U.S. at 50.

Even if the requirement that an elector intending to vote for a particular candidate must use the lever allocated to that candidate has the effect of limiting the exercise of the franchise to those persons who are able to follow the clear instructions, not only on the face of the machine but also on the sample ballots, that restriction is well within the power of the state. In *Lassiter*, this Court unanimously sustained the constitutionality of the North Carolina literacy test, stating that "the ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot." 360 U.S. at 51. Only last year, in deciding *Gray* v. *Sanders*, 372 U.S. 368, a case heavily relied upon by petitioner, this Court reaffirmed the power of the state to require qualifications of the sort upheld in *Lassiter*. 372 U.S. at 379.

If literacy, a standard which admittedly may cause an otherwise intelligent person to be ineligible to vote, is a sufficiently reasonable standard for use in promoting the "intelligent use of the ballot," 360 U.S. at 51; then a state requirement that an elector cast his vote by moving the appropriate lever allocated to a particular candidate is also clearly reasonable as an exercise of state power under Section 4 of Article I.

In addition, the Pennsylvania rule is separately justified as a necessary regulation to protect registered Democratic electors who vote in the proper spaces from the infringement of their constitutional rights which would occur if their votes were diluted by:

1. votes of persons not intending to vote for Democratic candidates;

2. votes of Republican and non-partisan electors not entitled under Pennsylvania law to vote in the Democratic primary.

To count the numbers in the blank spaces of Row C as if they were votes properly cast in the Democratic primary would effect just such a dilution. It was to prevent such a result that the Pennsylvania courts adopted the rule that electors may vote only by moving the designated voting-machine lever or by marking the designated ballot space.

The Pennsylvania rule applied in the instant case is in accord with the decisions of the overwhelming majority of jurisdictions which have considered the question. The two prior decisions involving voting machines also rejected blank-space numbers. *In the Matter of Cosgrove*, 267 App. Div. 822, 46 N.Y.S.2d 195 (1944) (blank space above proper row); *In the Matter of Lester*, 205 Misc. 67, 127 N.Y.S.2d 272 (1953) (blank space below proper row). Many jurisdictions with a practice of counting any paper ballots which clearly show the intention of the voter, regardless of imperfections or irregularities, nonetheless refuse to count ballots not marked in the proper voting square. *Harper* v. *Dotson*, 32 Idaho 616, 187 Pac. 270 (1920); *Nelson* v. *McBride*, 117 Minn. 387, 389-91, 135 N.W. 1002 (1912); *State ex rel. Crain* v. *Acker*, 142 Wis. 394, 125 N.W. 952 (1910); *O'Connell* v. *Mathews*, 177 Mass. 518, 59 N.E. 195 (1901) (per Holmes, *C.J.*); *People ex rel. Bantel* v. *Morgan*, 20 App. Div. 48, 46 N.Y. Supp. 898 (1897).

Other states which follow a more strict rule with regard to irregularities necessarily also reject blank-space ballots. *Tuthill* v. *Rendleman*, 387 Ill. 321, 56 N.E.2d 375 (1944); *Evans* v. *Reiser*, 78 Utah 253, 286-87, 2 P.2d 615 (1931); *Donlon* v. *Cooke*, 212 Iowa 771, 237 N.W. 496 (1931); *Hunt* v. *Campbell*, 19 Ariz. 254, 284-85, 169 Pac. 596 (1917); *Sweetser* v. *Pacheco*, 172 Cal. 137, 140-41, 155 Pac. 639 (1916); *Carwile* v. *Jones*, 38 Mont. 590, 595-96, 101 Pac. 153 (1909); *In Re the Ballot Marks*, 18 R.I. 822, 27 Atl. 608 (1893).

Only Kentucky, in the case cited by petitioner (Petition, p. 21), *Thompson* v. *Boling*, 240 Ky. 340, 42 S.W.2d 321 (1931), validates blank-space ballots under certain conditions.

NLRB v. *Whitinsville Spinning Ring Co.*, 199 F.2d 585 (1st Cir. 1952), also cited by petitioner (Petition, p. 19), is entirely consistent with the Pennsylvania rule, since that decision holds merely that an attempted erasure on a ballot which is otherwise clearly marked in the proper voting space is not grounds for rejection under federal law.

The federal decisions cited by petitioner in support of its constitutional argument consist mainly of reapportionment cases and criminal cases.

As pointed out above, the recent reapportionment decisions specifically recognize the constitutional right of the states to prescribe the manner of holding elections and to require nondiscriminatory qualifications of the type upheld in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45. See, *e.g.*, *Gray* v. *Sanders*, 372 U.S. 368, 379 (citing *Lassiter*).

In the cited criminal decisions, this Court held that various types of obviously criminal activity involving federal elections may be prosecuted under federal statutes. *Ex parte Yarbrough*, 110 U.S. 651 (conspiracy to beat Negro voter); *United States* v. *Mosley*, 238 U.S. 383 (conspiracy to discard valid ballots); *United States* v. *Classic*, 313 U.S. 299 (conspiracy to alter valid ballots); *United*

States v. *Saylor*, 322 U.S. 385 (conspiracy to stuff ballot boxes).

In the instant case, there is no basis in the record or in any facts outside the record for a charge that the Board of Elections of Philadelphia was in any way motivated by any intention to entrap voters or prevent votes from being counted. Any argument that the Board of Elections intentionally created the situation which caused votes to be miscast would have been considered absurd by the court below, which was familiar with the manner in which the Board of Elections had determined other issues favorably to the instant petitioner, albeit improperly, see *Blatt Appeal*, 414 Pa. 449 (1964) (dismissal of challenges to absentee ballots reversed), and which knew that the two majority Commissioners on the three-member Board of Elections were themselves Democratic ward leaders of the City of Philadelphia and therefore members of the same Democratic County Committee which is the petitioner in these proceedings.

Petitioner's comparison of the actions of the Board of Elections in the instant case with the actions of the conspirators in the federal criminal cases previously cited (Petition, p. 14), seems to be based upon the assertion in the petition that "the Election Board, however, failed to issue any instructions to the voters not to use Row C, and, arbitrarily refused to block off that row because of the cost of $3,000.00" (Petition, p. 6).

That assertion is not only unsupported by the record but is also contradicted by the statements made by petitioner's counsel in his argument to the trial court. Nothing in the record establishes the time at which any request was made of the Board by the petitioner that Row C be blocked by the use of specially-made devices manufactured for that purpose. No evidence was introduced to establish either that such a request was made or that the Board refused such a request.

The only mention in the record of the reasons for leaving Row C open appears in the statement made by

petitioner's counsel during argument in the trial court. Counsel originally stated:

> "To conclude this aspect of the factual picture, the Democratic City Committee requested the Board of Elections to block it out, but because there was a question of expense involved, and, I understand, because the question of time involved made it rather difficult, the Board decided not to block it out—I suppose, for those two reasons.
>
> • • • •
>
> THE COURT:—They didn't block them out because they didn't have enough time or money?
>
> MR. FREEDMAN:—Well——
>
> THE COURT:—Let us put it in understanding terms.
>
> MR. FREEDMAN:—That is about the size of it, or, at least, as we contend" (Testimony, pp. 21-22).

Later in his argument, petitioner's counsel showed that in fact, he did not know the exact reason why the Board of Elections did not block out the blank row:

> "MR. FREEDMAN:— . . . I think they [the Board of Elections] have tried to do their job as best they can. Maybe the time factor was involved, or the expense factor was involved. I am not criticizing the Board of Elections, but I am saying, however, that they made it possible" (Testimony, p. 126).

But, regardless of any negligence on the part of the County Board of Elections, the loss of a vote by an elector could not have occurred if the elector had met the requirement made plain not only by the setup of the voting machine itself but also by the "brief, clear" language of the sample ballot made available to each elector at the polls (Opinion of the Court, p. 13a; Concurring Opinion, p. 24a).

Unlike the voters in *Stassen for President Citizens Committee* v. *Jordan, cert. denied,* 377 U.S. 914, the electors in the instant case did not do "all in [their] power to qualify. . . ." 377 U.S. 927, 929 (memorandum of Douglas, *J.*, dissenting). Not having done so, no constitutional issue is created by the holding that they are not entitled to have their attempted votes counted.

II. No federal question whatsoever was timely raised in the state court; nor did the state court dispose of any federal question now urged by petitioner.

The lack of merit in the constitutional question now urged before this Court is shown by the total failure of petitioner's experienced counsel to raise any federal question in the state court proceedings prior to final judgment by the Supreme Court of Pennsylvania. This failure demonstrates persuasively that the facts of this case, when properly understood, do not present any federal constitutional question.

The first mention of the Constitution of the United States in these proceedings appeared in a petition for reargument filed after the entry of an order by the Supreme Court of Pennsylvania affirming the trial court and the administrative tribunal, but prior to the filing of the court's opinions.

Under settled rules of Pennsylvania procedure an issue—even a federal constitutional issue—which has not been raised in the trial court may not be raised for the first time before the Supreme Court of Pennsylvania. *Wynnewood Civic Assn.* v. *Lower Merion Township Board of Adjustment,* 406 Pa. 413, 419, 179 A.2d 649 (1962). *A fortiorari* a question may not be raised before the Supreme Court of Pennsylvania by a petition for reargument.

A federal question raised contrary to state practice for the first time in a petition for rehearing is inadequate

to support review by this Court unless the state court below actually entertains the petition and expressly decides the question. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128. Here the petition for rehearing was denied without being entertained.

Petitioner cannot rely upon the statement in the opinion of the court that "appellant has not been deprived of any right ordained or guaranteed by the Constitution of the United States" (Opinion of the Court, p. 21a).

First, the opinion of the court depends for its authority upon the votes of both Chief Justice Bell and Justice Roberts, the two Justices who joined in the opinion, since the third Justice concurred in the result. The statement in the opinion of the court written by Chief Justice Bell must therefore be read in light of the statement in the concurring opinion written by Justice Roberts to the effect that "no federal question—constitutional or otherwise—was raised, submitted or argued in this appeal. The record fails to reveal the presence of any such question" (Concurring Opinion, p. 29a).

Second, the statement that "appellant has not been deprived of any right ordained or guaranteed by the Constitution of the United States" is not the specific or definite statement of particular constitutional rights which this Court has always required to raise a federal question. Such a statement would be inadequate to support review if it had been made in a pleading filed in a timely manner by the petitioner. *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248; *Messenger* v. *Mason*, 10 Wall. 507, 509-10.

Third, and most critically, the alleged deprivation of the rights of *voters*, which petitioner seeks to litigate in this Court, is not the issue which was mentioned in the opinion of the Supreme Court of Pennsylvania. That court spoke of "appellant" Democratic City Committee's rights not of the rights of voters. If no federal question was

timely raised, and jurisdiction to review is sought to be grounded on a mention in the opinion of the state court, this Court will consider only the federal questions mentioned in that opinion, and will consider them only to the extent that they were so mentioned. *Wilson* v. *Cook*, 327 U.S. 474, 481-82 (per Stone, *C.J.*); *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Commission*, 297 U.S. 471, 473. Petitioner's misquotation of the state court's opinion at page 8 of the Petition, where it substitutes the word "voters" for the word "appellant," demonstrates that petitioner, too, is aware that the constitutional question which is now urged upon this Court was never disposed of or mentioned by the Supreme Court of Pennsylvania.

Since on the record no jurisdiction exists, it is incumbent upon petitioner to attempt to obtain a certificate from the Supreme Court of Pennsylvania establishing that the federal question which he now urges this Court to consider was passed upon by the state court. No reason appears why petitioner should be relieved from following the long-standing practice of this Court in similar situations. See, *e.g.*, *Herb* v. *Pitcairn*, 324 U.S. 117, 128.

III. Petitioner has no standing to litigate in this Court the constitutional rights either of voters whom it does not represent or of a candidate with whom it has no substantial connection.

Petitioner seeks to litigate in this Court questions concerning an alleged violation of the constitutional rights of those voters who pulled levers in blank spaces on Row C. The record shows a total lack of standing on the part of petitioner, the Democratic County Committee, to litigate any such constitutional issue in this Court.

This Court has always required that litigants asserting federal constitutional issues be the persons who are

actually injured by the deprivation of which they complain. *Tileston* v. *Ullman*, 318 U.S. 44; *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405. This Court has frequently held that a determination below that standing exists, or, as in the instant case, an omission by the state court to consider the question of standing, is not binding upon this Court. *Tileston* v. *Ullman, supra; Tyler* v. *Judges of the Court of Registration, supra*, 179 U.S. at 410.

No injury to the Democratic County Committee is shown by the record of this case and no injury to the Democratic County Committee is mentioned in the petition. Any injury arising from the failure of the regular party organization to enforce its selection for the nomination is entirely speculative and insufficient to create standing to litigate a constitutional issue. *Cf. Gange Lumber Co.* v. *Rowley*, 326 U. S. 295, 305 (no standing to litigate speculative financial injury).

Petitioner does not assert, nor can it assert, that it represents any voters.

Petitioner has no standing to litigate any constitutional rights which might be claimed by Michael A. Musmanno. The only connection claimed between the Democratic County Committee and Michael A. Musmanno arises from the Committee's endorsement of Michael A. Musmanno for nomination. If that tenuous contact is sufficient to give the Committee standing to litigate Michael A. Musmanno's constitutional rights, then it would seem that any person or committee who endorsed Musmanno would also have similar standing.

Nothing appears in the record to establish that the Committee has authority to litigate for Michael A. Musmanno in any representative capacity. Indeed, from all that appears, the Committee is wholly a stranger to Michael A. Musmanno in this proceeding. No litigation of constitutional issues is allowed by a stranger to the interest affected. *Lampasas* v. *Bell*, 180 U.S. 276, 283-4.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
PHILIP P. KALODNER,
GREGORY M. HARVEY,
Counsel for Respondent.

Of Counsel:

ROBERT J. BRAY, JR.
STANHOPE S. BROWNE
THOMAS B. MORRIS, JR.
FERDINAND P. SCHOETTLE, JR.

Appendix A

CONSTITUTION OF THE UNITED STATES

Article I, Section 4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Seventeenth Amendment

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Appendix B

Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, 25 Pa. Stat. Ann. (1963)

SECTION 702, 25 Pa. Stat. Ann. § 2812:

Qualifications of Electors at Primaries

The qualifications of electors entitled to vote at primaries shall be the same as the qualifications of electors entitled to vote at elections within the election district where the primary is held, provided that no elector who is not registered and enrolled as a member of a political party, in accordance with the provisions of this act, shall be permitted to vote the ballot of such party or any other party ballot at any primary.

SECTION 1216(d), 25 Pa. Stat. Ann. § 3056(d):

Instructions of Voters and Manner of Voting in Districts in Which Voting Machines Are Used

At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed. At elections, he may vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the names of candidates of his choice are placed, or he may vote a straight political party ticket in one operation by operating the straight political party lever of the political party or political body of his choice, if such machine has thereon a separate lever for all the candidates of the political body. He may also, after having operated the straight party lever, and before recording his vote, cancel the vote for any candidate of such political party or political body by replacing the individual key, handle, pointer or knob of such candidate, and may thereupon vote for a candidate of another party,

or political body for the same office by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate appears. In the case of a question submitted to the vote of the electors, the elector shall operate the key, handle, pointer or knob corresponding to the answer which he desires to give.

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IN THE

Supreme Court of the United States

October Term, 1964.

No. 391.

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA, on Behalf of MICHAEL A. MUSMANNO,
Petitioner,

v.

COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY,
Respondent.

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION.

ABRAHAM E. FREEDMAN.
1415 Walnut Street,
Philadelphia, Pennsylvania 19102.
Attorney for Petitioner.

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IN THE

Supreme Court of the United States.

October Term, 1964

No. 391.

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA, ON BEHALF OF MICHAEL A. MUSMANNO,
Petitioner,

v.

COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY,
Respondent.

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION.

Respondents Incorrectly Portray the Federal Question.

At the outset respondents challenge the jurisdictional allegation that the federal question was raised in the proceedings below and make the startling statement that the constitutional question was not raised until the filing of the petition for rehearing. This, in spite of the fact that the opinions of the Court below expressly and unequivocally consider and pass upon the constitutional question. The fact of the matter is that the constitutional question was raised at the very beginning of the first court hearing in this case, when Judge Carroll in the Court of Common Pleas said: "Was it a legal vote in the first place as intended by the Constitution?" (N. T. p. 31).

The majority, concurring and dissenting opinions of the State Supreme Court—even before the filing of the petition for rehearing—leave no room for doubt on this point. The Majority Opinion shows: "Furthermore, appellant has

not been deprived of any right ordained or guaranteed by the Constitution of the United States" (21a).

Respondents quote from the Concurring Opinion out of context to indicate that the federal question was not raised but they ignore that part of the same Concurring Opinion which specifically *deals with and passes upon* the Federal question as follows: "Neither Gray v. Sanders, 372 U. S. 368, 83 S. Ct. 801 (1963), *urged at argument,* nor any earlier or more recent decision, compels, supports or even suggests a result contrary to that reached here." (Emphasis supplied.)

The Dissenting Opinion considers Petitioner's argument at much greater length and points out the conflict of the majority's decision with Article I, Sections 2 and 3, and the 17th Amendment of the Constitution. All this was argued and passed upon before the Petition for Rehearing was filed. The Petition for Rehearing again gave direct emphasis to the Federal Question. The Court below denied that petition, but Justices Jones and O'Brien made it clear that they adhered to their original opinion. In the light of this history of the case, it is incredible that the respondents should attempt to persuade this Court to the conclusion that the constitutional question was not raised or considered in the Courts below.

It is to be noted that if, in fact, the Federal Question had not been properly raised in the Court below it would not have, under Pennsylvania law, been considered by the Supreme Court of Pennsylvania. In *Wynnewood Civic Assoc. v. Lower Merion Twp.*, 406 Pa. 413, 419, the Court said: "It is well settled that a question not raised properly in the court below will not be considered by this Court on appeal . . . , and that rule applies even though the question sought to be raised involves a constitutional issue." In this case, therefore, it must be considered as conclusively established that the Federal Question was properly raised in the Court below because it was in fact *accepted and passed upon* by that Court.

Moreover, as Stern & Gressman point out (Third Ed. at p. 101):

> "Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears. Whitney v. California, 274 U. S. 357, 360-1; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 134. 'There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.' Raley v. Ohio, 360 U. S. 423, 436. Any inquiry into how or when the question was raised in the state courts is then considered irrelevant to the exercise of the Court's jurisdiction. An irrebuttable presumption is created that the federal question was timely and properly raised."

This Court in *Manhattan Life Ins. Co. v. Cohen,* 234 U. S. 123, 134, declared it to be "an elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a Court below when it appears that such question was actually considered and decided."

The cases cited by respondents on this point are inapposite and do not qualify or condition the rule above stated. The indisputable and inescapable fact is that the Federal question was considered and passed upon by the Court below. Necessarily therefore, under this Court's rule of law, that question disappears from the case leaving the merits of the Federal question free for consideration.

Respondents' Diversions and Failure to Meet the Basic Issue Presented by the Petition.

Both respondents labor prodigiously to divert from the single basic issue presented in the clearest terms in the Petition for the Writ of Certiorari. The sole issue which has

been posed in this case by petitioner is—DID THE COURT BELOW VIOLATE THE FEDERAL CONSTITUTIONAL REQUIREMENTS, IN AN ELECTION INVOLVING A UNITED STATES SENATOR, IN REFUSING TO CONSIDER THE INTENTION OF THE VOTERS IN DISFRANCHISING 5624 VOTERS? Variously, respondents argue that the time, place and manner for the conduct of elections is left to the several states; that the Pennsylvania Statutes on the subject have long been recognized as valid and the "Pennsylvania Rule" conforms with decisions of this Court.

Having attempted to reduce the question to one involving a mere exercise of a state right, respondents follow with the contention that there is no Federal question, and then paradoxically urge that the Federal question has not been timely raised. Recognizing the fatal weakness in the lower Court's decision, Respondents endeavor to show, in an indirect manner, that the voters' intention was unclear, although, significantly, they refuse to recognize or meet the issue head-on—whether the lower Court committed reversible error in refusing to consider the voters' intention.

In their efforts to avoid the clear error of the Court below and in advancing their own contentions, respondents are guilty of extraordinary erroneous statements of fact and misapplication of legal principles.

Petitioner has never at any time attacked the validity of the Pennsylvania Statutes, as appears to be the basis of respondents' argument. On the contrary, your petitioner has placed great reliance in them. No suggestion has been made that the time, place and manner for conducting the elections are not left to the states, although it must also be conceded, as stated by Mr. Justice Black in his dissenting opinion in *Colegrove v. Green*, 328 U. S. 549, 571, that "the power thus granted to the State legislature on this subject is primarily derived from the Federal and not from the State Constitution", and that "a State legis-

lature cannot deny eligible voters the right to vote for Congressmen and the right to have their votes counted."

What your petitioner maintains here is that what the County Board of Elections did in this case diametrically opposed mandatory requirements of Pennsylvania statutes and thus deprived 5624 citizens of their rights of suffrage under Article I, sections 2, 3 and 4, and the Seventeenth Amendment, and implicit in the entire concept is the application of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

Section 1216(d) of the Pennsylvania Election Code provides that the elector's vote may be registered by the levers "upon or adjacent to" the candidate's name. This means that the statute permits the levers to be placed above or below the names. Indeed, the statutory requirements permit voting below the name, as is done in Pittsburgh, Pennsylvania, or adjacent to the name in the Philadelphia area. In this case, the Board of Elections, by leaving the levers open above and below the name, invited the voters to use either the upper or the lower levers. Either method was in strict conformity with the Pennsylvania statutory requirements. Furthermore, the Pennsylvania Election Code requires that the Election Board have the machines "properly prepared and placed in proper condition and order for use" (P.S. 3011(c)). To this end, these Boards have the statutory obligation to submit the machines to the respective political parties. When this was done in this case, your petitioner, on behalf of all of the Democratic voters of Philadelphia, immediately registered vigorous protest that if the Election Board intended to count only the votes registered by the upper levers, thousands of voters would be disfranchised because it could be anticipated that many voters would pull the lower levers intending to vote for the same Democratic candidates. There can be no possible question but that the voters who pulled the lower levers were acting in strict

compliance with the requirement of the statute as were those who pulled the upper levers. It is reasonable to argue that when the Board of Elections refused to block out the lower levers because of the $3,000.00 cost,[1] they tacitly

1. Respondent Blatt contends that the statements concerning the reasons for the failure of the Election Board to block out Row C are unsupported in the record and said further that they are inconsistent with the statement of petitioner's counsel on pages 21 and 22 of the transcript. An examination of the record shows that counsel's statements to which reference is made is clearly consistent with petitioner's position, and, in addition, further examination of the record shows that respondent Blatt's statement that this is the sole reference in the record is also clearly incorrect. On page 18 of the transcript, specific reference is made to the objection lodged by the Democratic County Committee to the failure to lock out the Row C levers and that it was anticipated many voters would use the lower as well as the upper levers. Again, on page 22, immediately following the respondent's quoted reference, there appears the statement that the cost of blocking off the machines had been fixed at $3,000.00. This was offered in the courtroom when all counsel were present and indeed the Commissioners were themselves present and there was no denial nor any suggstion from any counsel or party to the contrary. Indeed, the $3,000.00 figure was obtained from the respondent Board and given to the Court in answer to a specific question by the Court, as appears on page 22 of the transcript. Respondents' efforts at this point to deny these facts demonstrate all the more clearly the utter inexcusability and indefensibility of respondents' position. The respondent Board asserts that the Board contacted the voting machine manufacturer 10 days before the election and was informed that the cover plates could not be supplied in time for the election. There is absolutely nothing in the record to substantiate this assertion except that the appellant did request the Board to lock out the Row C levers. It is significant, however, by the respondent Board's statement in this respect that it admits it did have the responsibility to prepare the machines so that voters could not be deceived into voting on Row C. It is true, as stated by respondent Blatt, that there is no evidence in the record as to when the appellant requested the Board to lock out the Row C levers, but it is revealing to note that the Pennsylvania Elections Code (P. S. 1111(c)) requires the Board, "on or before the 40th" day prior to the election, to notify the political parties of the time and place that the machines will be exhibited for their inspection. Thus, if the Board did not exhibit the machines to the political parties in sufficient time to make the necessary adjustment to the machines, it was the Board's dereliction in failing to carry out a statutory duty in seeking the approval of the political party. On the other hand, if it did submit the machines in time, then it was equally derelict in

stated that all votes would be counted whether registered by the upper or lower levers since these votes could not possibly be for any other than the three specified senatorial candidates, namely, Blatt, Roberts or Musmanno.

Having set the machines so that the voters could use the upper or lower levers to vote "adjacent to" these Democratic candidates, the Election Board was duty bound to count the votes under the statute. In the light of these circumstances, respondents' diversionary argument that petitioner in effect is contesting the right of the State of Pennsylvania to fix the time, place and manner of holding the elections is absurd. Petitioner's basic issue and supporting arguments go to the very heart of the case. Respondents carefully avoid that basic issue and the supporting arguments.

Pennsylvania Rule.

Respondents frequently refer to the "Pennsylvania Rule" and argue that petitioner contends to the contrary, without stating anywhere what the Pennsylvania Rule is. The reason for this omission is immediately obvious when it is examined. The Pennsylvania Rule is very carefully outlined in Mr. Justice Jones' dissenting Opinion, joined in by Mr. Justice O'Brien, in which he traces the development of the Pennsylvania law with respect to the criteria in determining the validity of the votes cast. *It is clear from that Opinion that the strongest and most important part of the "Pennsylvania Rule" holds that the voter's intention is the paramount consideration in determining the validity*

failing to so adjust the machines so as to prevent error, as the statute required. Respondents' attempts to cast doubt upon the established fact that the Board of Elections refused to lock out the excessive levers on Row C, because of the $3,000.00 expense involved, is inexcusable. Not only does the record conclusively show this to be a fact, but the respondents *at no time*, prior to now, denied it to be a fact. Moreover, all three opinions in the Court below specifically acknowledged this to be a fact. (Majority Opinion, 14a; Concurring Opinion, 24a; Dissenting Opinion, 33a, 34a).

of any ballot. The Court below did not follow that Rule, but, on the contrary, violated it in expressly stating that it refused to consider the intention of the voters in disfranchising the 5624 voters in this case. In so doing, the majority below discriminated against these thousands of voters by refusing to accord to them the benefit of the Pennsylvania Rule. Petitioner has urged from the very outset that the Pennsylvania Rule required the Courts below to consider the intention of the voters. *What the respondents therefore really urge in this proceeding is not the Pennsylvania Rule as it has been uniformly applied down through the years, but rather the lower Court's decision which is a drastic departure from that Rule.*

The decision of the Court below not only runs counter to the Pennsylvania Rule, but collides head-on with the Federal Rule. In this connection, respondents' attempt to localize the issue and divorce it from any federal question is a transparent effort to circumvent the basic problem. In discussing the Pennsylvania Rule, respondents avoid reference to the Rule itself by injecting a number of decisions from various other states in which votes were nullified, although those cases nevertheless adhered to the principle that the voter's intention was paramount. Moreover, those cases involved paper ballots which presented a situation entirely different from the one which obtains on a voting machine. Where a voter uses a paper ballot he places a mark in a specific area, generally in the block to the right of the candidate's name, and he sees what he is doing. But when the voter pulled the levers on the voting machines employed in the thirteen Philadelphia wards here in question, no mark appeared on the face of the machine. The vote registered somewhere inside the machine and the voter had no way of determining whether his vote was properly recorded, but there can be no doubt, because of the physical properties involved, that those who voted on Row C were voting for the candidates whose names appeared above the levers they depressed.

Thus, as clearly demonstrated in the Dissenting Opinion below and in the various other cases, both in Pennsylvania and in virtually every other jurisdiction where voting machines are used, greater effort must be made to elicit the voter's intention in determining the validity of his vote than is required in paper ballots because of the intricacies of the machines and the possibilities of error.

This Court, in adhering to the doctrine of "one person, one vote" has inquired into various situations to insure that the right of suffrage will not be impaired or destroyed by any means, whether it be by the improper apportionment of the districts, by stuffing of ballot boxes, or by any other irregularity which must necessarily include the altering of voting machines. This Court has made it clear that the "one person, one vote" doctrine proscribes any device or means which would disfranchise a voter where the intention of the voter can be reasonably gleaned from the circumstances." Respondents' efforts to divert from the real issue in this case only emphasizes the invalidity of their position, and places in bold relief the fact that in departing from the Pennsylvania Rule, the Court below discriminated against 5624 voters by disfranchisement.

The False Cross-Over Issue.

Under "Question Presented", the respondent Board, seeking to avoid the issue of the intention of the voters, alleges cross-over voting. In point of demonstrable fact, the record is utterly barren of any evidence or even probative suggestion that there was any cross-over voting. In addition, the law, both Federal and State, is crystal clear that one is presumed to do right and not wrong; that he will obey the law and not violate it. (*Bank of United States v. Dandridge*, 12 Wheaton (U. S.) 64, 69-70, 6 L. Ed. 552, 554; *Rau v. Wilkes-Barre & E. R. R.*, 311 Pa. 510, 514; *Hal v. Barton*, 290 Mass. 476, 195 N. E. 753, 755; *State v. Walsh*, 62 Conn. 260, 25 Atl. 1, 4.) Thus, in the absence of

evidence to the contrary, the legal, inescapable presumption is that there was no cross-over voting.

Respondents' refusal to recognize this principle serves only to emphasize that the votes cast were unmistakably those of Democratic voters. As stated in the Petition, the Republicans could use only the lever above the Republican candidate's name, since the row of levers below those names was locked. Moreover, the record also clearly establishes that once any lever in the Republican or Democratic rows was pulled, it locked all other levers on all other rows involving the same office. Thus, no voter could vote more than once for any particular candidate, above or below the candidates' names.

The respondents' averment of "cross-over" voting, therefore, is not only refuted by the record, but is rebuffed by the established legal principle that voters must be presumed to vote honestly and not dishonestly in the absence of evidence to the contrary.

Respondents commit many other substantial errors in their "statements". Inter alia, they do not seem to understand and correctly distinguish the various rows on the machines. For example, repeated reference is made to Rows "A", "B" and "C", as though they pointed to the rows of candidates involved in the Republican and Democratic Primaries and the Special elections. The fact is, as may be immediately seen from the photograph attached to the Court's opinion, that Rows "A" and "B" refer *to the rows of levers* above the respective rows of candidates. These rows of levers are separate and completely apart from the rows containing the names of the Republican and Democratic candidates. Another misunderstanding under which respondents seem to be laboring involves Row "C", the row of levers immediately beneath the Democratic candidates, which respondents attempt to tie in with the Special election. The fact is, as may again be observed from the photograph attached to the Court's opinion, the candidates in the Special election were set out in a *vertical*

column under a *vertical* arrow to the marginal right of and below all of the candidates entered in the primary election. The picture clearly demonstrates by a pointing hand that Rows "A", "B" and "C" refer to the rows of levers.[2] It is repeated that the letters, "A", "B", and "C" pointed to the *levers* and not to the names. Thus, the voter, who believed that the names of the candidates were listed above the levers and not below, saw nothing on the face of the machine to instruct, advise or suggest to the contrary.

The Misleading "Sample Ballots".

Respondents labor at length, covering many pages of their briefs, urging that the voters disfranchised themselves because they had sample ballots available which accurately and unquestionably instructed the voters in the method of casting the ballots on the machines. The record is unequivocably to the contrary. The Board's counsel, Mr. Anderson, offered these same sample ballots in evidence (N. T., p.50) in representing that these left no margin for error. Petitioner's counsel exposed the misleading character of these ballots by immediately objecting, and the following took place:

> "MR. FREEDMAN: There is one serious material difference here, your Honor. On this sample ballot they *have the lever right in the box along with the name, where, as a matter of fact, if you look at the machine you find that the rows of levers are between the names.* It is entirely different, and that would give the impression that the lever is right in the same box with the candidate, which isn't so. *In addition to this, the sample ballot shows no levers whatsoever for Rows C and D.*

2. It would appear that respondent Board's counsel still seems to be confused concerning the connection of the several rows of levers and the rows of candidates to which the levers apply, as he was in the Court below when he indicated, in response to the Court's question, that Row "C" was the proper row of levers for the Democratic candidates.

> MR. ANDERSON: *What Mr. Freedman says is entirely correct.* My only purpose in showing it to your Honor is to show the instruction ballot which was available at the polling place, which was posted outside the polling place, and for that purpose only; also, to call your Honor's attention to the fact that in the instructions to the voter, where it says, at the bottom, 'turn down pointer over the name of the candidate in your own party that you wish to vote for, in this position,' showing a horizontal position, 'to this position,' showing a slanted vertical position. This is only presented for that purpose, *not that this is a correct representation of the voting machine itself.*" (Emphasis added.) (Transcript record, p. 51)

It is amazing that the respondents should now attempt to persuade the Court that these same ballots accurately reflected the method of voting on the machines. First of all, the record does not demonstrate that these ballots were made available to the electors (48a, 49a), since respondent's counsel simply stated that they were posted "outside" the polling places. But more importantly, such ballots as were seen by occasional voters did not reflect the true situation and served only to complicate and add to the confusion. They were not intended for this particular election since they did not contain Rows C and D and the candidates involved in the Special election were likewise not set out. In addition, and equally, if not more important, is the fact that on these sample ballots the levers were contained inside the boxes which contained the names of the candidates, while the levers on the machines were *outside* these boxes in separate rows above and below the boxes containing the candidates' names.

Further Incorrect Statements Relied on by Respondents.

It is also amazing that respondent Blatt's brief should state that the face of the voting machine carried instruc-

tions that voters were to vote by depressing the levers beneath the names instead of above, when the record conclusively establishes that there were no instructions of any kind on the face of the voting machines or elsewhere on the machine or in the voting booth. Indeed, an examination of the picture attached to the Court's Opinion clearly and conclusively establishes this point.

Another misstatement of fact, apparently intended to indicate that the fault lay exclusively with the voters, is the allegation in respondent Board's brief that "these voting machines have been used in the City of Philadelphia since 1930 and no difficulty had previously been encountered during the entire period although many special elections were held in the same manner". This statement is without any support whatsoever in the record. Not a single word of testimony was offered in substantiation, if in fact, this dehors the record statement could be considered to be relevant. Indeed, it could well be argued, that in all such prior cases the votes recorded by levers under the names were counted, and no one disputd this legal, logical and fair conclusion. This fact could have been developed had respondent argued below the proposition it here advances for the first time.

Another unsupportable statement offered by the respondents is to the effect that in several polling places certain of the machines were reserved for Republicans and others for Democrats, and that in those reserved for Republicans, votes were cast in Row C. Having reached this conclusion, they thereupon reasoned that Republicans voted in Row C. An examination of the record shows that there is not a scintilla of evidence to support such a statement. The respondents endeavored to prove this contention in the Trial Court in a highly improper manner by introducing a "mathematical psychologist" who "presumed", who "believed", and who "was told" that some of the machines were reserved for the Republicans and some for the Democratic voters and he concluded that Repub-

licans therefore voted in Row C. This testimony was so utterly and fantastically incredible and in conflict with every recognized rule of evidence that the Trial Court was compelled, on motion of Petitioner's counsel, to strike it all from the record (8a). Notwithstanding this, respondents persist, nevertheless, in assuming that this condition did, in fact, exist, wholly ignoring the fact that there is not a shred of evidence to support such a statement.

Another unsupportable proposition is the long, complicated discussion in respondent Blatt's brief about votes in "15C", "16C", "17C", "blank columns 39, 40", "Row D", "17 voting machines utilized only by Republicans and non-partisans", with a total of 60 votes, all of which is wholly irrelevant to the issue in the case. But what is more important yet is that this discussion is based on the Answer of Genevieve Blatt, which was never accepted as evidence, and the testimony of the "mathematical psychologist", whose testimony was stricken from the record.

These factual errors, and others not here mentioned, are obviously advanced by the respondents for the express purpose of showing collaterally that the intention of the voters was unclear and that, therefore, the Court below was justified in its conclusion. The respondents carefully refrained from meeting the sole issue in the case, namely whether the voter's intention should have been considered, apparently recognizing that the mere acknowledgment of the issue would effectively undermine and destroy the very basis for the lower Court's decision in disfranchising the 5624 voters.

The decision of the Court below obviously conflicts with the requirements of the Constitution of the United States and with the many interpreting decisions of this Court. It would indeed pose a dangerous precedent if permitted to stand, since it would undermine the most precious right of democracy, the right of suffrage.

The Parties.

Respondents claim that the Democratic County Committee has no standing to prosecute this matter, that they do not represent the voters or the candidate, Michael A. Musmanno, and that, therefore, the Petition should be denied.

This novel assertion finds no support in the record or the authorities. The Democratic County Committee appeared in its own name on behalf of all of its endorsed candidates before the Board of Elections and thereafter appealed under the same name to the Court of Common Pleas. Again the Committee took its appeal to the State Supreme Court in its own name on behalf of its endorsed candidates. At no time throughout these proceedings was any objection made to the Democratic County Committee as a party to the proceedings. On the contrary, the Committee was recognized as the proper representative of all the candidates. The Democratic County Committee of Philadelphia represents the enrolled members of the Democratic Party in Philadelphia. Indeed, the Board of Elections is required to recognize the Democratic County Committee under the State statute as the representative of the Democratic voters and is required to submit to it for inspection the voting machines and the method of voting (25 P. S. 3011(c)).

It may well be asked who else could be looked to for more authoritative protection of the Democratic voters than the Democratic County Committee. In this day and age, when the Courts in the formulation of their rules have provided for and advocated class actions in order to eliminate countless multiple actions by individuals, and where the Courts have recognized all forms of legal proceedings instituted by representatives of particular groups where such representatives indicate a reasonable connection and interest in the proceeding, it seems incongruous and patently erroneous for respondents here, particularly at this

late date, to challenge the Democratic County Committee as a party in these proceedings.

Moreover, respondents ignore completely the fact that the Democratic County Committee has instituted this action "on behalf of Michael A. Musmanno" with the latter's full knowledge and consent as a voter and as a candidate. Any voter in Pennsylvania could, indeed, have filed this law suit because his vote would be affected and diluted by the action of the State Court below in refusing to count the 5624 votes. It is also paradoxical that respondent Blatt should protest Musmanno's right to bring this action when she herself is presently a party and has been one throughout these proceedings. Respondents would thus seek to deprive Michael A. Musmanno of the same privilege enjoyed by Miss Blatt.

In support of their position the respondents cite four cases, none of which could possibly apply to the facts at bar. In *Tyler v. Judges of the Court of Registration,* 179 U. S. 405, the question was whether due process of law obtained when persons could be deprived of registration rights by the posting of notices and publication. The Court held the plaintiff could not be a party since he had indeed received the requisite notice. In *Lampasas v. Bell,* 180 U. S. 276, the City of Lampasas contended that certain bonds were voided because the residents of territory incorporated into the City had not been given an opportunity to be heard as to whether they should be made subject to taxation in the City. The Court held that the City had no proprietary right or interest in the "territory proposed to be incorporated"; that the residents had the right to submit to incorporation and that there had been no question of the validity of incorporation for six years. In *Tileston v. Ullman,* 318 U. S. 44, the Court held that a physician had no property rights in his patients. In *Gange Lumber Co. v. Rowley,* 326 U. S. 295, the appellant lumber company contended that a workmen's compensation law, imposing certain liability for payment of premiums, deprived it of property without due process of law. The

Court held that it was "entirely problematic" whether the appellant would be required to pay additional increase and if so, whether it would be "wholly mathematical and infinitesimal or substantial", and that its loss, if any, would be nothing more "than the bare possibility of some injury in the future".

Obviously, the interest claimed in these four cases cannot compare in any way to the precious constitutional right of suffrage of the 5624 citizens represented by the appellant in this case, nor can it compare to the almost incalculable value of the office of United States Senator. The situation here is entirely dissimilar and involves different consideration.

This Court has recently definitively passed upon the question of representative rights in litigation. In *N. A. A. C. P. v. Alabama*, 357 U. S. 449, this Court held that the N. A. A. C. P. had the right to represent the rights of its members, stating that "its nexus with them is sufficient *to permit that it act as their representative before this Cou t.* In so concluding, we reject respondent's argument that the Association lacks standing to assert here constitutional rights pertaining to the members, who are not of course parties to this litigation." (Emphasis supplied.) It stated further that it would assert jurisdiction where "constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court."

Certainly it is more appropriate that the Democratic County Committee act in behalf of the Democratic voters here involved than that the 5000-plus Democratic voters personally file their individual actions.

In *Louisiana v. N. A. A. C. P.*, 366 U. S. 293, this Court reaffirmed the Alabama decision, stating: "It is clear from our decisions that NAACP has standing to assert the constitutional rights of its members."

In *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 187, Mr. Justice Jackson, in a Concurring Opinion, said:

> "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."

In *Barrows v. Jackson,* 346 U. S. 249, the Court allowed jurisdiction where the "action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." In *Barrows,* the Court discussed with approval *Pierce v. Society of Sisters,* 268 U. S. 510, involving a state statute requiring parents to send their children to public schools. A private and a parochial school brought suit to enjoin enforcement of the act on the ground that it violated the constitutional rights of parents and guardians. No parent or guardian to whom the act applied was a party or before the Court. The Court allowed the action. The Court, in *Barrows,* summing up the *Pierce* case, said: "In short, the schools were permitted to assert in defense of their property rights the constitutional rights of the parents and guardians."

Conclusion.

Respondents by their Answers emphasize the need for a review of the decision below. Their incorrect statements of fact and their studied avoidance of the basic issue in this case highlight the lower Court's error in refusing to consider the voters' intention. That element is indispensable under the Federal law, and no State law, regulation or rule of procedure of any Election Board can whittle away this basic right, which enjoys the strongest Constitutional protection.

The Petition for the Writ of Certiorari should be granted and the decision below reversed to the end that a

dangerous precedent not be permitted to gain a beachhead to breach one of America's most fundamental and precious constitutional rights.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

NO. 391, OCTOBER TERM, 1964.

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA, on Behalf of MICHAEL A. MUSMANNO, Petitioner,

v.

COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY, Respondent.

MOTION OF CHARLES S. HELMIG FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

PAUL GINSBURG
Carlton House, 550 Grant Street
Pittsburgh 19, Pennsylvania,
Attorney for Movant.

SMITH BROS. CO., INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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MOTION OF CHARLES S. HELMIG FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Charles S. Helmig respectfully moves this Honorable Court to enter an Order granting him leave to file a brief as *amicus curiae* in the above captioned proceeding, and particularly to present the basic and fundamental issue of whether or not Hon. Michael A. Musmanno, petitioner herein, was even qualified to be a candidate in the controversial Primary Election, and in support hereof it is averred:

1. Charles S. Helmig is a citizen, a registered voter in Allegheny County, Pennsylvania, and a steel broker with offices at Pittsburgh, Pennsylvania.

2. The Petition for Writ of Certiorari filed on behalf of Michael A. Musmanno fails to disclose the fact that at all times involved herein he is and was an Associate Justice of the Supreme Court of Pennsylvania and thus subject to the Canons of Judicial Ethics, adopted by that Court as well as by this Honorable Court.

3. It is provided in Canon 30 of the Canons of Judicial Ethics, "While holding a judicial position he should not become *an active candidate either at a party primary* or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, *he should resign* in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party." (Emphasis supplied.)

4. On or before February 18, 1964, petitioner Musmanno became a candidate for the United States Senate; lost the Primary Election held on April 28, 1964; and as a matter of record herein has been litigating ever since.

5. According to said Canon 30, Mr. Justice Musmanno should have resigned from the Supreme Court of Pennsylvania not later than February 18, 1964. Contrarily, however, he continued as an active member of that Court, hearing arguments during the March Term and rendering decisions thereon up to the present time.

6. A relevant question which should be presented herein, but has not been, is whether or not Mr. Justice Musmanno was qualified to run for the said political office, by reason of his failure to have resigned as a Justice of the Pennsylvania Supreme Court. It is an elementary maxim that "Equity looks upon that as done which ought to be done". Consequently, if this Honorable Court should apply the equitable maxim, Mr. Justice Musmanno has not been a member of the Supreme Court of Pennsylvania since February 18, 1964; and if the said maxim is not held to be applicable, then he remains a member of that Court, but has been and is unqualified as

a political candidate. This Honorable Court's determination of that fundamental and basic issue would render all of the other questions presented herein moot.

7. The foregoing leads to the nature of your applicant's interest in this proceeding. Mr. C. S. Helmig is the plaintiff-appellant in Appeals Nos. 91 and 92, March Term, 1964, in the Supreme Court of Pennsylvania against Rockwell Manufacturing Company and Bethlehem Steel Company. After the arguments had thereon during the March Term at Pittsburgh, Mr. Justice Musmanno on June 1, 1964, entered erroneous Orders dismissing those Appeals, accompanied by an "Opinion" from which it was evident that the jurist failed to discuss or adjudicate any of the issues before the Court, sanctioning severe and serious deprivations of property and other important rights without due process of law. In the assumpsit action against Rockwell, your applicant was deprived of a jury verdict in the amount of $177,811.20, with interest, through fraud; and in the trespass action against Rockwell and Bethlehem, your applicant was illegally deprived of his right to a trial for substantial compensatory and exemplary damages.

8. In view of the foregoing, upon a determination that Mr. Justice Musmanno then was not a member of the Pennsylvania Supreme Court through the application of the aforesaid equitable maxim, then and in that event your applicant herein as appellant therein will become entitled to a reargument of his Appeals followed by the entry of Orders of Court accompanied by an Opinion which should comply with Canons 19, 20 and 22 of the Canons of Judicial Ethics as well as the usual and accepted practice, under which circumstances your applicant would prevail.

9. The applicant's requests for consent to file a brief as *amicus curiae* have been opposed by attorneys for the petitioner, the respondent, and petitioner's adversary candidate, Genevieve Blatt. Hence this Motion under Rule 42.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Movant.
Carlton House, 550 Grant Street,
Pittsburgh 19, Pennsylvania,
412-471-6060